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## Gerrymandering and the Constitutional Norm Against Government Partisanship

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# GERRYMANDERING AND THE CONSTITUTIONAL NORM AGAINST GOVERNMENT PARTISANSHIP

Michael S. Kang\*

*This Article challenges the basic premise in the law of gerrymandering that partisanship is a constitutional government purpose at all. The central problem, Justice Scalia once explained in *Vieth v. Jubilerer*, is that partisan gerrymandering becomes unconstitutional only when it “has gone too far,” giving rise to the intractable inquiry into “how much is too much.” But the premise that partisanship is an ordinary and lawful purpose, articulated confidently as settled law and widely understood as such, is largely wrong as constitutional doctrine. The Article surveys constitutional law to demonstrate the vitality of an important, if implicit norm against government partisanship across a variety of settings. From political patronage, to government speech, to election administration and even in redistricting itself, *Vieth* is the exception in failing to bar tribal partisanship as a legitimate state interest in lawmaking.*

*The puzzle therefore is why the Supreme Court in *Vieth* diverged from this overarching norm for legislative redistricting where the need for government nonpartisanship is most acute and so rarely met. The Article proposes a new approach focused on legitimate state interest and partisan purpose, building on a constitutional norm against government partisanship. The importance of consolidating and reifying this norm, in its most salient legal context, cannot be overstated at a time when hyperpolarization between the major parties dominates national politics and is at its most severe in our lifetime.*

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#### INTRODUCTION

Gerrymandering for partisan advantage is so well ingrained that Justice O'Connor once remarked that refusal by politicians in charge of redistricting to seek party advantage should be grounds for impeachment.<sup>1</sup> The routine, historical entanglement of partisanship with redistricting long discouraged courts from entertaining constitutional claims against partisan gerrymandering. Even after the Supreme Court declared the justiciability of such claims, it has since stumbled to articulate a manageable standard for adjudication. The “central problem,” as Justice Scalia put it in *Vieth v. Jubelirer*, is how to set a standard that properly measures “when political gerrymandering has gone too far” given that “[t]he Constitution clearly contemplates districting by political entities, and unsurprisingly that turns out to be root-and-branch a matter of politics.”<sup>2</sup> The core premise that partisanship “is a traditional criterion [in the law of politics], and a constitutional one”<sup>3</sup> leads necessarily to the analytical challenge of sorting out permissible partisanship from “how much is too much.”<sup>4</sup> But the premise that partisanship is an “ordinary and lawful motive,”<sup>5</sup> articulated confidently as settled law by Justice Scalia and widely understood as such, is also largely wrong as a matter of constitutional doctrine.

What goes forgotten is how little support there is elsewhere in constitutional law, beyond *Vieth*, for Justice Scalia’s proposition that the government can engage in purposeful partisan discrimination at all. Earlier case law on redistricting acquiesced to the consideration of *political* criteria in the redistricting process, but there was at best only implicit suggestion of the constitutional permissibility of overt *partisan* discrimination by the government. The Court itself agreed that government consideration of redistricting’s political consequences was inevitable and constitutional.<sup>6</sup> The government, for example, may consider respect for traditional political boundaries and subdivisions, district compactness and contiguity, and preserving communities of interest, among other things. The government must consider other legal imperatives in redistricting, including the one person, one vote doctrine and

1. See THE SUPREME COURT IN CONFERENCE (1940–1985), at 866 (Del Dickson ed., 2001).

2. 541 U.S. 267, 285, 296 (2004) (plurality opinion) (citation omitted).

3. *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting).

4. *Vieth*, 541 U.S. at 298 (quoting *id.* at 344 (Souter, J., dissenting)).

5. *Id.* at 286.

6. See *infra* Section I.B.

the Voting Rights Act, which often have partisan consequences baked into them. However, courts acknowledging the need for and inevitability of the government referring to political considerations rarely, if ever, went so far as to endorse the active discrimination by the state for and against political parties in redistricting—at least until *Vieth*.

Of course, this refusal makes perfect sense. The notion that the majority party in government can actively discriminate against the interests of the opposition violates a basic sensibility about democratic competition and fairness. By partisanship here, I mean the “tribal partisanship,” as Justin Levitt defines it, so endemic to redistricting.<sup>7</sup> Tribal partisanship is primarily about benefitting one’s own team of common partisan affiliation, or injuring the one’s partisan opponents, apart from other, legitimate considerations.<sup>8</sup> The partisan use of government power in this sense, to disadvantage competing parties in the process of democratic contestation, is the definition of a process failure begging judicial intervention. For exactly this reason, courts have enforced a basic norm of government neutrality when it comes to political partisanship in constitutional law.<sup>9</sup> First Amendment case law about government speech and patronage most clearly announces the principle against government partisanship, but the norm permeates constitutional law under many different rubrics, including equal protection case law addressing other elements of redistricting and election administration.<sup>10</sup> Without unified judicial recognition of the principle as such, the implicit norm draws from a common structural instinct against government political discrimination and partisan animus in its most flagrant forms.

It is ironic that one area of constitutional law where the Court has expressly sanctioned partisanship, at least where it does not go too far, is the regulation of partisan gerrymandering. Constitutional challenges to partisan gerrymanders have confronted two basic premises set up by *Vieth* and its logic: First, *Vieth* appeared to decide that partisanship in districting is a constitutional state interest “so long as it does not go too far.”<sup>11</sup> And second, Justice Kennedy’s controlling opinion in *Vieth* required an objective standard for demarcating where partisanship in districting has gone too far.<sup>12</sup> The legal and political science scholarship on partisan gerrymandering has largely, but incorrectly, accepted the first as a predicate to the second challenge of an objective standard for excessive partisan effects. An objective standard for excessive partisan effects has been conceptually unmanageable because it necessitates identification of the “fair” entitlement to representation as a normative baseline from which to measure the representational

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7. Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1798 (2014).

8. *Id.*

9. See *infra* Part II.

10. See discussion *infra* Sections II.A, II.B.

11. *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting).

12. See *Vieth v. Jubelirer*, 541 U.S. 267, 307–08 (2004) (Kennedy, J., concurring in the judgment).

injury in partisan gerrymandering. And so, *Vieth* has stalled effective judicial oversight of partisan gerrymandering for more than a decade and counting.

The broader constitutional context I describe here identifies *Vieth* as the puzzling aberration from the general norm against government nonpartisanship. It therefore undercuts the first premise from *Vieth* that partisanship is a constitutional state interest at all. If partisanship is not a constitutional state interest for state lawmaking, then there is no need for the intractable inquiry into an objective standard for determining when partisan effect goes too far. Partisanship simply does not count, as I will explain, as a legitimate government interest to justify official government decisionmaking—whether the effect is large or small. For this reason, courts should focus not on whether partisan effects of partisan gerrymandering are excessive and go too far, but instead on the centrality of partisan purpose to the specific government decisionmaking in question.<sup>13</sup> Virtually every plausible approach or standard for judging the constitutionality of partisan gerrymandering already incorporates and requires proof of government partisan purpose or intent.<sup>14</sup> Judicial inquiry into partisan purpose or intent is itself nothing new in redistricting. If the government cannot offer a legitimate state purpose beyond partisanship, then the redistricting should be unconstitutional under equal protection, even under rational basis, irrespective of how extreme the gerrymander's partisan effects.

I describe how this focus on legitimate state interests and partisan purpose in gerrymandering is more faithful to the overarching norm against government partisanship across constitutional law and is grounded in Justice Stevens's approach to gerrymandering back in *Vieth*. Although the law of partisan gerrymandering has been obsessed with measurement of partisan effects since *Vieth*, this proposed focus on government purpose offers a more coherent approach that would unify and reify the healthy principle against state partisanship.

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13. Richard Fallon distinguishes legislative purpose and intent from legislative motive and motivation. Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 525, 535–45 (2016). Purpose or intent speak to the proximate aims sought by legislation, while motive and motivation denote the internal values, beliefs, and dispositions that make desirable those aims. See *id.* Legislative purpose or intent can be identified as a matter of law by the fact that a majority of legislators acted with a specific intent, or may be discerned by objective deduction when there is no psychologically plausible explanation for their decisions to enact other than the specific intent. See *id.* at 541–45.

14. See, e.g., *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment) (requiring purpose to impose burdens on a disfavored party); *id.* at 339 (Stevens, J., dissenting) (proposing unconstitutionality when “a naked desire to increase partisan strength” is the only possible explanation for a gerrymander); *id.* at 350–51 (Souter, J., dissenting) (requiring proof that the government acted intentionally to dilute the vote); *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (requiring “intentional discrimination against an identifiable political group”); *Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016) (requiring discriminatory intent or purpose), *prob. juris. postponed to hearing on the merits*, 137 S. Ct. 2268 (2017); Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. (forthcoming Apr. 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3011062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3011062) [<https://perma.cc/XZD9-BFE4>] (arguing that a finding of impermissible invidious partisan intent should be sufficient for unconstitutionality).

Never before in the modern era has judicial oversight of partisan gerrymandering been more needed. Courts have actively engaged the law of democracy since the 1960s and *Baker v. Carr*.<sup>15</sup> This dive into the political thicket, ironically, occurred at a historically aberrational moment of unusual bipartisanship. The major parties enjoyed a rare period of cross-party cooperation and ideological overlap in the glow of post-war prosperity, galvanized by the solidarity necessitated by Cold War imperatives. Political divisions were largely regional and focused less on party than race, pitting the conservative one-party South largely against progressive wings of both parties. As a partial result, the nascent election law developed by the Court over the ensuing decades focused on racial discrimination in voting and elections to the neglect of a larger partisan realignment between Republicans and Democrats that defines modern-day politics and government. Today's inherited election law thus deals with overweening partisanship only in scattershot fashion, almost as distractions from the original problems of racial discrimination.<sup>16</sup>

Discouraged by *Vieth*, courts addressing the hyperpolarized party politics of today, with its aggressive tribal partisanship, lack a clearly declared constitutional principle from which to draw doctrinal support. As Sam Issacharoff has described it, "[C]ourts are left in the bizarre world of trying to define the consequences of too much partisanship without an ability to condemn partisanship as such."<sup>17</sup> Commentators have been puzzled by recent voting rights decisions to strike down or otherwise restrain government discretion where, under traditional equal protection methodology, only the permissive standard of rational basis review should apply.<sup>18</sup> Courts have been typically deferential to regulation with predictable partisan consequences, provided regulation can be plausibly justified on other grounds, however pretextual.<sup>19</sup> But when partisan motivations of the government are undeniably plain, they have compelled courts to curb arbitrary action even under rational basis in the absence of another state interest.<sup>20</sup> These cases make sense if understood in relation to a broader, albeit undeclared constitutional norm against government partisanship. In recent cases over new

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15. See *infra* Section I.B.

16. See *infra* Section III.B.

17. Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299, 322 (2016).

18. See, e.g., Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1898 (2013) (explaining that such decisions "may well be justified as an expansion of precedent, but [they] cannot be defended as a natural extension of that precedent"); Issacharoff, *supra* note 17, at 311 (noting that claims in one prominent case "did not translate into a denial of a fundamental right, nor . . . readily equate to a burden on the franchise" and similarly "did not trigger easy equal protection lines of division along familiar categories such as race or national origin").

19. See *infra* notes 283–309 and accompanying text.

20. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

voter identification requirements and early voting cutbacks, courts confronted government restrictions on voting rights that could not be sensibly understood as anything except raw partisanship and were forced to invent creative bases for minimizing their harms.<sup>21</sup>

Today's hyperpolarized partisanship presents ever-increasing stress on this doctrinal vulnerability, especially in redistricting.<sup>22</sup> Unprecedented coordination and investment by the Republican Party in the 2011 redistricting cycle<sup>23</sup> contributed mightily to Republican takeover of both houses of Congress, the twenty-four states currently under unified Republican government, and Republican control of sixty-nine of ninety-nine state legislative chambers, an all-time high.<sup>24</sup> Democrats are now poised to respond in kind for the 2021 redistricting cycle with their own organized national effort.<sup>25</sup> Lower courts already took the lead in recognizing a partisan gerrymandering challenge in Wisconsin,<sup>26</sup> with cases proceeding elsewhere in Maryland,<sup>27</sup> North Carolina,<sup>28</sup> and Pennsylvania.<sup>29</sup> The Court now will revisit partisan gerrymandering in *Gill v. Whitford*, the Wisconsin case, ahead of the 2021 redistricting cycle.<sup>30</sup> It should acknowledge, and build upon, the constitutional norm against government partisanship in reorienting the law toward a purpose-focused approach.

First, courts need not obsessively weigh partisan effects when the government's exclusive partisan purpose, distinct from its legitimate state interests, is clear.<sup>31</sup> Although focus is on partisan purpose beyond mere subjective

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21. See *infra* Section I.C.

22. See generally Nolan McCarty, *Reducing Polarization: Some Facts for Reformers*, 2015 U. CHI. LEGAL F. 243 (describing modern hyperpolarization and exploring its causes); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011) (same).

23. See generally DAVID DALEY, *RATF\*\*KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY* (2016).

24. See Amber Phillips, *These 3 Maps Show Just How Dominant Republicans Are in America After Tuesday*, WASH. POST (Nov. 12, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/11/12/these-3-maps-show-just-how-dominant-republicans-are-in-america-after-tuesday/?utm\\_term=.152326bf0091](https://www.washingtonpost.com/news/the-fix/wp/2016/11/12/these-3-maps-show-just-how-dominant-republicans-are-in-america-after-tuesday/?utm_term=.152326bf0091) [<https://perma.cc/H8KU-YMBE>].

25. See Edward-Isaac Dove, *Dem Redistricting Group Clocks \$10.8 Million in First 6 Months*, POLITICO (July 31, 2017, 5:35 AM), <http://www.politico.com/story/2017/07/31/democratic-redistricting-fundraising-obama-241154> [<https://perma.cc/TP9P-DHXP>].

26. *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *prob. juris. postponed to hearing on the merits*, 137 S. Ct. 2268 (2017).

27. *Benisek v. Lamone*, No. 13-cv-03233-JKB, 2017 WL 3642928 (D. Md. Aug. 24, 2017), *appeal docketed*, No. 17-333 (U.S. Sept. 1, 2017).

28. *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 166 F. Supp. 3d 553 (E.D. N.C.), *aff'd in part, rev'd in part*, 827 F.3d 333 (4th Cir. 2016).

29. *League of Women Voters v. Commonwealth*, No. 261-MD-2017 (Pa. Commw. Ct. filed June 15, 2017).

30. 137 S. Ct. 2268 (2017) (mem.) (setting the case for hearing and postponing consideration of jurisdiction).

31. Partisan purpose could be imputed from direct evidence that the government acted with partisan purpose or objective conclusion that no other account of legitimate legislative purpose can explain the redistricting. See Fallon, *supra* note 13, at 541–47; see also Caleb

motivation,<sup>32</sup> an irony of the post-*Vieth* world is that governments have been emboldened and sometimes confess openly to partisan purpose in redistricting, confident that plaintiffs will struggle to demonstrate excessive partisan effects under *Vieth*.<sup>33</sup> When the government admits or demonstrably relies on partisan purpose as its basis for lawmaking, these egregious cases should be actionable even without a showing of excessive partisan effects. Government admissions and evidence regarding the majority's partisan purpose, vis-à-vis legitimate government interests in redistricting, should be decisive irrespective of partisan effects beyond some threshold showing. As a consequence, governments in charge of redistricting would be forced to clean up their partisanship and moor their decisions more rigorously to public-regarding justifications and interests. This firmer requirement of state justification would substantively limit the achievable partisan advantage that could be plausibly justified as serving legitimate government interests, as well as tangibly re-orienting the redistricting process against today's blatant and overt partisanship.

New focus on partisan purpose would help resolve an important absurdity in the latest generation of racial gerrymandering claims. The state in *Harris v. McCrory* argued it discriminated against African Americans not on racial grounds, but against them as Democrats, because race correlates so tightly with party identification in the South.<sup>34</sup> The possibility of this “party, not race” defense exemplifies the absurdity of *Vieth*'s faith that partisanship is a constitutionally legitimate state interest “so long as it does not go too far.”<sup>35</sup> This self-contradictory faith creates the paradoxical defense that the state could racially discriminate if it can justify the discrimination on the basis of partisanship.<sup>36</sup> But government purpose to discriminate on the basis of either party or race ought to be unconstitutional, provided government

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Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008) (surveying judicial approaches for determining legislative purpose); Levitt, *supra* note 14 (manuscript at 46–50) (outlining existing judicial methods for determining legislative purpose in redistricting cases). This approach can be reconciled with the broad framework of *Vieth* and more recently in *Whitford v. Gill* in the sense that it likewise requires partisan intent and effect for unconstitutionality. The important difference, of course, is that the current law emphasizes egregiousness of partisan effect. The approach advocated here requires some threshold partisan effect, but instead places greater weight on the role of partisan purpose in the government's decisionmaking.

32. See *Bd. of Educ. v. Mergens ex rel. Mergens*, 496 U.S. 226, 249 (1990) (distinguishing between “legislative purpose” and the “motives of the legislators who enacted the law” (emphasis omitted)).

33. See, e.g., Patrick Gannon, *Has Partisan Gerrymandering Finally Gone Too Far?*, SALISBURY POST (June 24, 2016, 1:08 PM), <http://www.salisburypost.com/2016/06/24/patrick-gannon-has-gerrymandering-finally-gone-too-far/> [https://perma.cc/2ATX-PY8C] (quoting the North Carolina redistricting chair publicly stating, “I acknowledge freely that this will be a political gerrymander, which is not against the law”).

34. 159 F. Supp. 3d 600, 618–19 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017).

35. *Larios v. Cox*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting).

36. See *supra* notes 1–5 and accompanying text.



decisionmaking cannot otherwise be justified with reference to legitimate state interests. Only the bizarre notion that partisanship is a legitimate state interest, if it does not go too far, even opened the door to any version of this perverse defense in racial gerrymandering cases.

Second, extreme partisan effects still may be relevant to a partisan gerrymandering claim, but mainly as indirect proof of essential partisan purpose. At some extreme, egregious partisan bias in electoral consequences of a redistricting cannot be explained by legitimate government criteria but instead can be explained only as a consequence of purpose to secure partisan advantage. Courts should assess whether a gerrymander's extreme partisan effects can be explained with reference to legitimate government criteria and other objective considerations like geography or residential dispersion. Political and computer scientists have developed sophisticated models for helping with this type of determination, and when partisan bias reaches sufficiently high levels, it becomes impossible to resist the conclusion of government purpose to produce significant and durable partisan advantages for the majority.<sup>37</sup> Note, though, that this approach offers no constitutional guarantee of a "fair" apportionment,<sup>38</sup> only a right against naked government partisanship in the redistricting process. The simple fact that a redistricting produces significant partisan bias is insufficient for a constitutional claim if it can be explained plausibly with reference to legitimate government interests. Purpose is the principal focus, with effects an indirect means for its inference. Indeed, perhaps the most charitable way to understand even the insistence in *Vieth* on excessive partisan effects is as a prudential limitation to cases where partisan purpose is undeniably the basis for redistricting.

In Part I, I introduce the law of gerrymandering, beginning with *Davis v. Bandemer* and leading to *Vieth v. Jubelirer*. I argue that Justice Scalia's salesmanship in his lead opinion in *Vieth* successfully diverted the law of gerrymandering toward a misguided obsession with partisan effects. Justice Scalia distracted the Court from a purpose-based approach offered by Justices Stevens and Breyer that is far more nuanced and focused than Justice Scalia acknowledged, but has been largely misunderstood and forgotten. Although political considerations are intrinsic to redistricting, and partisanship obviously pervades the redistricting process, unadorned government discrimination on the basis of partisanship violates constitutional law.

In Part II, I survey constitutional law to demonstrate the vitality of this implicit norm against government partisanship across a variety of settings. From political patronage, to government speech, to election administration,

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37. See, e.g., Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239 (2013); Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 ELECTION L.J. 351 (2016).

38. See, e.g., *Whitford v. Gill*, 218 F. Supp. 3d 837, 869 (W.D. Wis. 2016) (rejecting a claim that "any apportionment scheme that purposely prevents proportional representation is unconstitutional" (emphasis added by court) (quoting *Davis v. Bandemer*, 478 U.S. 109, 129–30 (1986) (plurality opinion))), *prob. juris. postponed to hearing on the merits*, 137 S. Ct. 2268 (2017).

and even in redistricting, *Vieth* is the exception in failing to bar tribal partisanship as a legitimate state interest in lawmaking. Courts, with varying degrees of explicitness, have struck down clear government partisanship that cannot be defended otherwise in terms of legitimate state interests. In Part III, I propose a better approach to partisan gerrymandering based on the norm against government partisanship. Modeled after the Court's one person, one vote doctrine, the approach would require that a plaintiff show that partisan purpose rather than legitimate state interests accounts for the gerrymander's partisan characteristics, independent of their extremeness. I address potential criticisms from opposite directions that this approach goes too far and that it does not go far enough. Finally, I outline the urgency of surfacing the nascent antipartisanship principle that has been emerging in election law cases over the last decade as a needed judicial response to modern hyperpolarization. The 2021 redistricting cycle is just around the corner, hanging in the balance.

#### I. LAW OF PARTISAN GERRYMANDERING AND *VIETH V. JUBELIRER*

The Court's recent redistricting decisions assume the constitutionality of partisan gerrymandering provided it does not go too far. The law of partisan gerrymandering has since been obsessed with the quest for a judicially manageable standard for measuring excessive partisanship, without any successful resolution so far. However, jurisprudential support for the constitutionality of government partisanship in redistricting is surprisingly thin, certainly far less convincing than usually supposed since *Vieth*. The Court has clearly and consistently held that political considerations are legitimate government interests in redistricting but rarely if ever, until *Vieth*, expressed constitutional approval for purely partisan motivations.

##### A. *Vieth and the Quest for a Manageable Standard*

The Court first attempted to put constitutional limits on partisan gerrymandering in *Davis v. Bandemer*.<sup>39</sup> In federal district court, Indiana Democrats won their equal protection challenge to the 1981 decennial state redistricting of their state house and senate districts under Republican control.<sup>40</sup> Under that Republican gerrymander, Democratic candidates for the Indiana House received 52 percent of the votes in the 1982 elections across the state but won only forty-three of 100 House seats.<sup>41</sup> Reviewing the constitutional challenge, the district court found that the Republicans drew districts without consideration for existing political subdivision boundaries, often splitting counties and townships sometimes with "simply no conceivable justification."<sup>42</sup> The court concluded there was "no refuting that the Republican majority focused on protecting its incumbents and creating every

39. 478 U.S. 109 (1986).

40. *Bandemer*, 478 U.S. at 109.

41. *Id.*

42. *Bandemer v. Davis*, 603 F. Supp. 1479, 1487 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109.

possible 'safe' Republican district possible."<sup>43</sup> In particular, skillful use of multimember districts led to Democrats winning only three of twenty-one House seats in the Indianapolis metropolitan area, despite winning 46 percent of the vote there.<sup>44</sup>

The Supreme Court reversed the district court on the judgment, but in the process, the Court also declared political gerrymandering to be constitutionally justiciable under the equal protection clause.<sup>45</sup> Justice White's opinion for the Court reasoned that earlier decisions subjecting legislative districting to equal protection challenges on one person, one vote and racial vote dilution grounds spoke to the common question of adequacy of representation in state legislatures.<sup>46</sup> The fact that a political gerrymandering claim is "submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability," though it obviously differentiates how claims are adjudicated.<sup>47</sup> Writing for a plurality, Justice White required that, to win a political gerrymandering claim, plaintiffs needed to prove intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.<sup>48</sup> To establish discriminatory effect, plaintiffs needed to show more than a mere lack of proportional representation. They needed to prove "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."<sup>49</sup>

The *Bandemer* standard, though, proved exceptionally difficult to satisfy. Over eighteen years of cases decided under *Bandemer*, only one time did a trial court find an equal protection violation under the *Bandemer* standard.<sup>50</sup> Even the single successful claim proved the rule, not the exception. A district court found that North Carolina's system of judicial elections for state superior court unconstitutionally discriminated against Republicans under the *Bandemer* standard.<sup>51</sup> Just five days after the decision, however,

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43. *Id.* at 1488. Republican leaders, as the district court noted, made no apology for their partisan motivations. *Id.* Republicans in the General Assembly voted out empty reapportionment bills to a conference committee composed entirely of Republicans who worked on the substance in secret, without Democratic input or public hearings until two days before a party-line floor vote. *See Bandemer*, 478 U.S. at 175–76 (Powell, J., concurring in part and dissenting in part). One Republican House leader acknowledged "[t]he name of the game is to keep us in power." *Id.* at 177–78.

44. *Bandemer*, 478 U.S. at 182. Earlier iterations of these districts had been challenged unsuccessfully as racially dilutive under equal protection in *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

45. *Bandemer*, 478 U.S. at 113 (plurality opinion).

46. *See id.* at 118–21 (majority opinion).

47. *Id.* at 125.

48. *Id.* at 127 (plurality opinion).

49. *Id.* at 132.

50. *See Republican Party of N.C. v. Hunt*, No. 94-2410, 1996 WL 60439 (4th Cir. Feb. 12, 1996) (describing the lower court's order, issued on November 3, 1994, which invalidated North Carolina's judicial election scheme).

51. *Id.*

Republican candidates for superior court swept the next set of elections so convincingly that the Fourth Circuit promptly reversed.<sup>52</sup>

Whether the near total absence of success under *Bandemer* was the Court's intention seems unanswerable even to the justices themselves at this point. Dan Lowenstein argued that *Bandemer* purposely (and correctly) set an extremely high bar for partisan gerrymandering claims.<sup>53</sup> In Lowenstein's telling, it is possible to read *Bandemer* as articulating a standard for partisan gerrymandering that could be met only if it was "so powerful."<sup>54</sup> The predictable outcome under the standard was that a partisan gerrymander, at least of the common variety, could never satisfy the *Bandemer* standard short of the historically extreme malapportionment preceding the one person, one vote rule.<sup>55</sup> Under Lowenstein's account, it was no surprise that there was virtually no success under *Bandemer* because the result was intentional and judicially appropriate.<sup>56</sup>

The Court's decision to schedule *Vieth v. Jubelirer* for oral argument in 2003 seemed to presage clarification about partisan gerrymandering, one way or the other. The Court appeared poised either to declare partisan gerrymandering nonjusticiable after all, or in the alternative, articulate a more workable and attainable standard. Astoundingly, the Court's 4–1–4 split in *Vieth* somehow made exceptionally murky law even murkier and less certain. Over a splintered set of opinions, the justices expressed seemingly every possible position on the constitutionality of partisan gerrymandering but coalesced a cohesive majority for none of them. Neither skeptics nor advocates of judicial supervision over partisan gerrymandering were pleased or any surer of the applicable law.

Refusing to overrule *Bandemer* and declare partisan gerrymandering nonjusticiable, a majority of five justices voted in favor of continuing the "possibility of judicial relief" for partisan gerrymandering in redistricting cases.<sup>57</sup> Four of these five justices endorsed specific standards for judging the constitutionality of partisan gerrymanders and would have reversed the lower court's dismissal of the plaintiffs' challenge to the Republican gerrymander of Pennsylvania's congressional districts litigated in *Vieth*.<sup>58</sup> Justice Kennedy, however, held the pivotal vote on both questions of threshold justiciability and the constitutional standard under which claims should be

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52. *Id.*

53. See Daniel Hays Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING AND THE COURTS* 64, 82–86 (Bernard Grofman ed., 1990).

54. See Daniel H. Lowenstein, *Vieth's Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 *CORNELL J.L. & PUB. POL'Y* 367, 378 (2005).

55. See *id.*

56. *Id.* at 379.

57. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment).

58. *Id.* at 318–19 (Stevens, J., dissenting); *id.* at 347–51, 355 (Souter, J., dissenting); *id.* at 365–68 (Breyer, J., dissenting).

judged. Justice Kennedy agreed with the aforementioned four justices on the first question to uphold the justiciability of the gerrymandering claim.<sup>59</sup>

But on the second question of the constitutional standard, Justice Kennedy refused to affirm the old *Bandemer* standard and *also* refused to articulate a new one or join the other four justices with respect to any of their proposed new standards.<sup>60</sup> In rejecting these potential standards, Justice Kennedy explained that “[b]ecause there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards” for identifying unconstitutional partisan gerrymandering.<sup>61</sup> The absence of an objective baseline made it difficult to measure the harm and define an impermissible threshold of constitutional injury. In other words, Justice Kennedy insisted upon an affirmative vision for legitimate districting practices and fair partisan outcomes before developing a negative standard for unlawful partisan gerrymandering that goes too far. Unless one can initially identify the “fair” baseline entitlement of political representation, it is impossible to judge precisely when a gerrymander inflicts excessive harm by granting less representation than the rightful allocation.

Nevertheless, Justice Kennedy still voted in favor of justiciability because he left open the possibility of future development of just such a vision. He insisted that “new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties” and therefore facilitate judicial identification of a suitable standard in the future.<sup>62</sup> As a result, Justice Kennedy explained that lower courts should continue to litigate partisan gerrymandering claims, but he declined to articulate a specific constitutional standard under which such claims should be litigated—a position that Justice Scalia ridiculed as “not legally available.”<sup>63</sup> Unfortunately, Justice Kennedy’s peculiar opinion actually spoke for the Court in *Vieth* as the narrowest ruling in favor of the Court’s judgment affirming the lower court.<sup>64</sup> One scholar has described this outcome as producing “a limbo where a standard for identifying unlawful gerrymanders might exist but has yet to be discovered.”<sup>65</sup>

Justice Scalia wrote in *Vieth* for four justices against the justiciability of partisan gerrymandering under any standard. Justice Scalia admitted that

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59. *Id.* at 306 (Kennedy, J., concurring in the judgment).

60. *Id.* at 306–17.

61. *Id.* at 307–08.

62. *Id.* at 313.

63. *Id.* at 301 (plurality opinion).

64. *Cf.* *Marks v. United States*, 430 U.S. 188, 193 (1977) (ruling that absent a majority opinion, the holding of the case is defined by the “position taken by those Members who concurred in the judgments on the narrowest grounds” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)))

65. Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1382 (2012) (emphasis omitted).

they did not dispute “the incompatibility of severe partisan gerrymanders with democratic principles” and agreed that “an *excessive* injection of politics is *unlawful*” in legislative districting.<sup>66</sup> But Justice Scalia premised their opposition to justiciability on the political question doctrine.<sup>67</sup> Under the doctrine, he explained that there was no judicially manageable standard for the “original unanswerable question” of when “political gerrymandering has gone too far.”<sup>68</sup> For Justice Scalia, the “record of puzzlement and consternation” under the *Bandemer* standard proved the unmanageability of any standard for gerrymandering.<sup>69</sup> Agreeing with Justice Kennedy, he argued that there were no objective criteria to guide and constrain lower courts judging for excessive partisanship in redistricting, at least beyond a general sense of partisan fairness.<sup>70</sup> Furthermore, the regular influence of partisanship in districting meant that court challenges based on partisanship would always be sufficiently credible to drag courts into greater oversight of this political process.<sup>71</sup>

Critically complicating the analysis for Justice Scalia was that he insisted *some* level of partisanship in districting was constitutionally permissible. He underscored the point by beginning with a long exposition of gerrymandering’s historical pedigree dating back to the colonial period.<sup>72</sup> This pedigree bolstered his contention in *Vieth* that partisanship is “an ordinary and lawful motive” in districting and that “partisan districting is a lawful and common practice.”<sup>73</sup> Justice Scalia argued that “setting out to segregate [voters] by political affiliation is (so long as one doesn’t go too far) lawful and hence ordinary.”<sup>74</sup> *Vieth* therefore presented a difficult and nuanced question of “drawing the line between good politics and bad politics.”<sup>75</sup> To regulate partisan gerrymandering, the Court needed a standard that tolerated some regular minimum of partisanship in districting, but still required lower courts to measure the quantum of partisanship in a particular case against an objectively defined threshold of impermissibility. And in Justice Scalia’s view, it was impossible to craft a workable standard for guiding lower courts on “[h]ow much political motivation and effect is too much” to meet these requirements.<sup>76</sup>

This problem of separating permissible from impermissible partisanship, in this framing, was the key to the unmanageability of any partisan

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66. *Vieth*, 541 U.S. at 292–93 (plurality opinion).

67. *Id.* at 277.

68. *Id.* at 296–97.

69. *Id.* at 282.

70. *Id.* at 291.

71. *Id.*

72. *Id.* at 274–75.

73. *Id.* at 286.

74. *Id.* at 293.

75. *Id.* at 299.

76. *Id.* at 297.

gerrymandering standard. Justice Scalia, for instance, distinguished standards from other areas of law regulating government partisanship along these lines.<sup>77</sup> The *Shaw v. Reno* cases prohibit the predominant use of race in districting and offer a model for regulating partisanship that the *Vieth* plaintiffs tried to build upon and that Justice Stevens endorsed in dissent.<sup>78</sup> Justice Scalia argued, however, that regulating race was different than regulating partisanship because “segregating voters on the basis of race is not a lawful one,” whereas doing so based on partisanship was “a lawful and common practice.”<sup>79</sup> The standard for race in the *Shaw* cases was manageable, while any standard for partisanship was not, because inspecting a districting scheme for “a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive.”<sup>80</sup> Justice Scalia saw a significant difference between identifying any of something and identifying too much of it, at least in this context.<sup>81</sup> Like Justice Kennedy, Justice Scalia believed the latter required an affirmative sense of what lawful partisanship looked like, while the former did not.

Justice Scalia’s framing of the problem in *Vieth* quickly defined the law of partisan gerrymandering. Even dissenting in *Vieth*, Justice Souter agreed that “some intent to gain political advantage is inescapable whenever political bodies devise a district plan” such that “the issue is one of how much is too much.”<sup>82</sup> He aimed the proposed standard in his dissent at “identify[ing] clues, as objective as we can make them, indicating that partisan competition has reached an extremity of unfairness.”<sup>83</sup> When the Supreme Court returned to the problem in its next major gerrymandering case, *LULAC v. Perry*,<sup>84</sup> Justice Kennedy again recited the same dilemma over the proper standard. Evaluating a gerrymander of Texas’s congressional districts, he explained once again the need for a “workable test for judging partisan gerrymanders.”<sup>85</sup>

A group of *LULAC* amici proposed the use of partisan-symmetry scores, invented by political scientists Gary King, Bernie Grofman, and Andrew Gelman, among others, that measure bias in the number of votes each party needed to win additional seats.<sup>86</sup> Partisan-symmetry scores purport to compute the differential advantage the majority party enjoys from the gerrymander by calculating when one party needs many more votes than the other to

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77. *Id.* at 285–90.

78. 509 U.S. 630 (1993); *see also Vieth*, 541 U.S. at 317–41 (Stevens, J., dissenting).

79. *Vieth*, 541 U.S. at 286 (plurality opinion).

80. *Id.*

81. *Cf.* Richmond Campbell, *The Sorites Paradox*, 26 *PHIL. STUD.* 175 (1974).

82. *Vieth*, 541 U.S. at 344 (Souter, J., dissenting).

83. *Id.*

84. 548 U.S. 399 (2006).

85. *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.).

86. *Id.* at 419–20 (discussing the amicus brief).

win additional seats—the hallmark of an effective gerrymander.<sup>87</sup> But Justice Kennedy’s majority opinion dismissed the proposed measures as “not a reliable measure of unconstitutional partisanship”<sup>88</sup> and rejected another partisan gerrymandering claim for lack of a sufficiently convincing objective standard for partisan effects.<sup>89</sup> Why? It was still unclear to Justice Kennedy when, under any measure, a score for differential advantage crossed over from lawful partisanship to excessive partisanship.<sup>90</sup> This question was unavoidably normative. The measure of asymmetry quantified the majority advantage but could not by itself pinpoint an obvious normative threshold to be drawn between Scalia’s lawful practice and a greater, unlawful degree of bias that should be unconstitutional. There, political science of the time seemed to offer the Court little help.

The case law and scholarship since *Vieth* has been likewise obsessed with the quest for a judicially manageable standard for judging “how much is too much” in partisan gerrymandering.<sup>91</sup> The Court has not heard another partisan gerrymandering case since *LULAC*, but lower courts have skeptically reviewed these claims, with the Court’s insistence on a convincing standard at the forefront.<sup>92</sup> Virtually all the intervening scholarship on partisan gerrymandering focused on the feasibility of a judicial standard and its possible contours. Some commentators concluded that no judicially manageable standard as Justice Kennedy imagined it was feasible and largely surrendered the possibility.<sup>93</sup> Some commentators proposed specific approaches based on specific measures. Ned Foley, for instance, endorsed a quantitative measure of geographic compactness devised by Steve Ansolabehere and Maxwell Palmer<sup>94</sup> and then proposed that a gerrymander’s excessiveness be judged against the benchmark score for the original eponymous gerrymander by

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87. *Id.* For instance, King and Gelman compare how the parties fare hypothetically if each received a given percentage of the vote, relying on a uniform swing assumption for their estimates. See Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 AM. J. POL. SCI. 514, 517–28 (1994).

88. *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.).

89. *Id.* at 423.

90. *Id.* at 420.

91. *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2004) (plurality opinion) (quoting *id.* at 344 (Souter, J., dissenting)).

92. See, e.g., *Perez v. Perry*, 26 F. Supp. 3d 612 (W.D. Tex. 2014); *Ala. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala.), *appeal dismissed*, 134 S. Ct. 694 (2013); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563 (N.D. Ill. 2011); *Pearson v. Koster*, 359 S.W.3d 35 (Mo. 2012) (per curiam); *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368 (W. Va. 2012).

93. See, e.g., Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1 (2008); Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability After Vieth v. Jubelirer*, 73 GEO. WASH. L. REV. 1166 (2005).

94. Stephen Ansolabehere & Maxwell Palmer, *A Two Hundred-Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741 (2016).



Elbridge Gerry from 1812.<sup>95</sup> Nick Stephanopoulos and Eric McGhee offered a new measure of partisan bias with their efficiency gap.<sup>96</sup> Their score calculates each party's wasted votes as a percentage of total votes cast as a metric for comparative efficiency in converting votes to seats by each party. Any efficiency gap between the majority and minority parties reflects the gerrymander's partisan skew.<sup>97</sup> Across these disparate approaches, two assumptions hold as lasting lessons from *Vieth*: First, scholars focused mainly on a gerrymander's partisan effect rather than partisan purpose.<sup>98</sup> Second, they echo Justice Scalia from *Vieth* in assuming some partisanship is lawful and then identifying the core problem as determining "how much is too much."<sup>99</sup>

### B. An Alternate View

Justice Scalia's successful framing of partisan gerrymandering law as a question of "how much is too much"<sup>100</sup> has dominated the law and scholarship, but surprisingly, this framing is more a matter of judicial salesmanship than foundation in constitutional law. Justice Scalia claimed soon after *Vieth* that "all but one but one of the Justices agreed" in the case that partisanship "is a traditional criterion, and a constitutional one, so long as it does not go too far."<sup>101</sup> But even that claim is questionable at best, and I will argue, so too is the larger assertion of partisanship as a legitimate government motivation in districting.

Of course, there was no question whether Justice Stevens contested the legitimacy of partisan considerations in districting. Justice Stevens had long railed against gerrymandering of all sorts, whether racial, partisan, or otherwise, as fundamental problems of equal protection that should be adjudicated under the same analytic framework he offered in cases from *Mobile v. Bolden* to *Bandemer v. Davis* to *Vieth v. Jubelirer*.<sup>102</sup> For Justice Stevens, "the Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose."<sup>103</sup> As a consequence, Justice Stevens reasoned that "political affiliation is not an appropriate standard for excluding voters

95. Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship*, 84 U. CHI. L. REV. 655, 720–24 (2017).

96. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 849–67 (2015).

97. *Id.*

98. See, e.g., Ansolabehere & Palmer, *supra* note 94; Foley, *supra* note 95.

99. *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2004) (plurality opinion) (quoting *id.* at 344 (Souter, J. dissenting)); see, e.g., Stephanopoulos & McGhee, *supra* note 96, at 834–38.

100. *Vieth*, 541 U.S. at 298 (quoting *id.* at 344 (Souter, J. dissenting)).

101. *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (emphasis omitted).

102. See generally Pamela S. Karlan, *Cousins' Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521 (1996).

103. *Vieth v. Jubelirer*, 541 U.S. 267, 333 (2004) (Stevens, J., dissenting).

from a congressional district.”<sup>104</sup> Districting choices explained only by bare partisanship, unaccompanied by any other government rationale, would be unconstitutional even under rational basis because “an acceptable rational basis can be neither purely personal nor purely partisan.”<sup>105</sup>

Justice Stevens therefore challenged head-on Justice Scalia’s essential claim that constitutional law acquiesced to government partisanship “so long as one doesn’t go too far.”<sup>106</sup> In *Vieth*, Justice Stevens censured Justice Scalia for “assuming that politics is ‘an ordinary and lawful motive.’”<sup>107</sup> Instead, Justice Stevens countered that, until *Vieth*, “there ha[d] not been the slightest intimation in any opinion written by any Member of this Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line.”<sup>108</sup> Furthermore, First Amendment law outlawing government patronage based on bare partisanship made clear a constitutional prohibition against state action “for the sole and unadorned purpose of maximizing the power of the majority.”<sup>109</sup> In those cases, it was unconstitutional for partisan officeholders to reward fellow party members and punish nonmembers through government patronage, despite long historical practice.<sup>110</sup>

What explains this stark disagreement about the constitutional permissibility of government partisanship between Justices Scalia and Stevens? Where Justice Stevens saw no constitutional sanction for partisanship as a state motivation in districting, Justice Scalia saw partisanship as an ordinary and lawful motive. They disagreed not only normatively about what constitutional law ought to have been on the question, but also empirically about what the Court had already decided by what each justice believed were unambiguous terms.

First, the justices drew radically different conclusions from the fact that the Court’s previous decisions consistently recognized redistricting as an inherently political process, driven by fundamentally political interests and consequences. The Court had always acknowledged, as Justice Scalia observed, that the “Constitution clearly contemplates districting by political entities, and unsurprisingly that turns out to be root-and-branch a matter of politics.”<sup>111</sup> In this sense, the Court’s previous decisions rejected any idealistic fancy that legislative redistricting could be preserved as neutral, apolitical, or otherwise segregated from the complex political considerations that usually dominate the process. The Court permitted the government, among

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104. *Id.* at 325.

105. *Id.* at 338.

106. *Id.* at 293 (plurality opinion).

107. *Id.* at 324 (Stevens, J., dissenting).

108. *Id.* at 336–37.

109. *Id.* at 326.

110. *See id.* at 324 (discussing the Court’s decision to apply strict scrutiny to First Amendment cases in which there is “a purpose to discriminate on the basis of politics”).

111. *Id.* at 285 (plurality opinion) (citation omitted).

other things, to respect traditional political boundaries, preserve communities of political interest, reflect the parties' respective voting strengths, avoid pairing incumbent officeholders, and comply with various state and federal mandates including the Voting Rights Act and one person, one vote.<sup>112</sup> Toward that end, the Court accepted as commonplace the government's consultation of political data and consideration of districting's electoral consequences in the redistricting process. Overarching this framework, as Justice Scalia emphasized, the Court had knowingly observed that partisan interests pervade any redistricting process executed by political actors.<sup>113</sup>

Justice Scalia conflated the Court's past acceptance of government consideration of redistricting's partisan consequences with a broader endorsement of government partisanship as a motivation for redistricting. The Court had sanctioned *political* motivations for redistricting in line with the various recognized state interests the government was entitled to pursue in redistricting. Toward that end, even government consideration of political data on party registration, past voting patterns, and other predictors of redistricting's partisan implications were relevant in helping assess how well the state could satisfy its goals in achieving representational fairness or carving out majority-minority districts for racial minorities for instance.<sup>114</sup> That is, the state was entitled to weigh partisan considerations and make districting choices with their partisan implications in mind in pursuit of legitimate political objectives. This acceptance, though, is different from permitting the state to redistrict with purely partisan motivations to advantage one major party at the expense of the other. Political motivations were inherent in districting, as was consideration of partisan consequences, but as Justice Stevens tried to point out in *Vieth*,<sup>115</sup> the bare purpose of partisan discrimination without reference to any other legitimate state interest, political or otherwise, was not necessarily permissible by implication as Justice Scalia assumed.

Consider, for example, *Gaffney v. Cummings*, which is frequently cited as Court sanction for partisanship in redistricting. Along these lines, the Court there explained that "[t]he reality is that districting inevitably has and

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112. For purposes of the Article, I assume *arguendo* the legitimacy of these state interests grounded in past decisions. However, I have previously criticized incumbency protection as a normative matter, see Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. PUB. POL'Y 443 (2005), and agree that purposeful government insulation of incumbents in redistricting raises similar concerns about government discrimination I discuss here. What is more, courts have most clearly recognized a narrow government interest in avoiding contests between incumbents as opposed to a broader interest in protecting incumbents from challenge in general. See Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage Is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107, 1145–46 (2016).

113. See *Vieth*, 541 U.S. at 285 (plurality opinion).

114. See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences.").

115. *Vieth*, 541 U.S. at 318 (Stevens, J., dissenting).

is intended to have substantial political consequences.”<sup>116</sup> In rejecting a constitutional challenge to Connecticut’s legislative redistricting, the Court reasoned that “[i]t would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it.”<sup>117</sup> Justices Scalia and Kennedy cited these statements from *Gaffney* repeatedly in *Vieth* for the notion that the government may constitutionally discriminate in redistricting based on political classifications.<sup>118</sup> But the Court hardly endorsed partisan gerrymandering in *Gaffney*. Quite the opposite. The Court upheld a redistricting by a bipartisan commission that attempted to allocate seats to the major parties in accordance with their voting strength during the previous three elections.<sup>119</sup> It concluded only that there was no constitutional ground to strike down a redistricting plan “because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation.”<sup>120</sup> In acquiescing to the political essence of redistricting, the Court explained that consideration of party registration and voting records was constitutional against any contrary claim in *Gaffney* that redistricting decisions must be made “without regard for political impact.”<sup>121</sup> In this sense, the Court in *Gaffney* upheld the consideration of political and partisan consequences in redistricting, but did so absolutely without endorsing partisan gerrymandering to deliberately minimize the political strength of an opposing party. All the case facts actually pointed to the opposite conclusion.

Second, Justices Scalia and Stevens drew different lessons from the Court’s previous acquiescence to partisan advantage resulting from the political process of redistricting. The Court’s previous decisions contemplated that the state’s pursuit of legitimate political ends in districting would result in partisan advantage and disadvantage so long as it was controlled by self-interested political actors. Regardless of how insistently courts required redistricting to be tied to legitimate state interests, the Court acknowledged that “[d]istrict lines are rarely neutral phenomena”<sup>122</sup> and “implicate a political calculus in which various interests compete for recognition.”<sup>123</sup> This acknowledgment reflected an understanding that self-interested politicians

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116. *Gaffney*, 412 U.S. at 753.

117. *Id.* at 752.

118. See *Veith*, 541 U.S. at 285–86 (plurality opinion); *id.* at 307 (Kennedy, J., concurring in the judgment).

119. *Gaffney*, 412 U.S. at 754.

120. *Id.* But see *Davis v. Bandemer*, 478 U.S. 109, 154–55 (1986) (O’Connor, J., concurring in the judgment) (claiming equivalence between the bipartisan gerrymander in *Gaffney* and partisan gerrymanders).

121. *Gaffney*, 412 U.S. at 753.

122. *Id.*

123. *Miller v. Johnson*, 515 U.S. 900, 914 (1995).

would always bend redistricting choices to their advantage, given the partisan stakes, and always find ostensible justification in some related state interest to defend those choices against legal challenge.<sup>124</sup> As Justice Scalia argued, “[T]here always is a neutral explanation—if only the time-honored criterion of incumbent protection.”<sup>125</sup> So, the Court related, and acquiesced to, a realistic awareness of the underlying political dynamics in redistricting beyond the surface-level justifications required from the state.

Again, though, the Court’s realistic acceptance of partisan motivations in districting as a practical matter did not necessarily compel or imply the Court’s acceptance of partisan motivation as a legal *justification* for constitutional purposes. There is a meaningful difference between, on one hand, understanding that government actors in charge of redistricting are tacitly motivated by partisan self-interest that belies their pretextual justifications and, on the other hand, outright endorsing partisanship as a legitimate government interest in redistricting. For this reason, Justices Stevens and Breyer took pains to emphasize the role of nonpartisan justifications in their approaches to *Vieth*. Justice Breyer identified unjustified entrenchment as the harm from partisan gerrymandering and defined it as “the result of partisan manipulation and not other factors” such as “sheer happenstance,” other constitutional requirements, or “reliance on traditional . . . districting criteria.”<sup>126</sup> For Justice Stevens, the relevant question was whether a “neutral criterion can be identified to justify the lines drawn.”<sup>127</sup> Both justices therefore focused on whether redistricting decisions could be justified by nonpartisan state interests, regardless of any partisan advantage baked into them, or whether “partisanship is the legislature’s sole motivation.”<sup>128</sup>

Why accede to tacit partisanship in redistricting that can be ostensibly justified with reference to other government interests? Why not simply stamp out any subjective partisan motive when it leads to partisan advantage if partisanship is the core harm? One answer is that any sort of prohibited legislative intention is too hard to detect and too easy to conceal. Canny legislators who intend a partisan gerrymander but know that their intention is prohibited by law will mask their legislative intentions and articulate their purposes only in public-spirited terms. This concealment already occurs for most partisan skirmishes in the so-called voting wars, where lawmakers try

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124. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 643 (2002) (proposing a categorical prohibition against redistricting by self-interested insiders in part as a response to this inevitability).

125. *Vieth v. Jubelirer*, 541 U.S. 267, 300 (2004) (plurality opinion) (emphasis omitted).

126. *Id.* at 360–61 (Breyer, J., dissenting).

127. *Id.* at 339 (Stevens, J., dissenting).

128. *Id.* at 318. Consider Richard Fallon’s distinction between permissibility of actions and permissibility of motives. Fallon, *supra* note 13, at 565. He presents the hypothetical of a legislature that passes a law requiring childhood vaccination because it dislikes Christian Scientists, who oppose vaccination on religious grounds. *Id.* The legislature’s psychological motivation is capricious, but a court still could uphold the law’s constitutionality if the law independently serves a compelling interest, such as halting a disease epidemic. See *id.*

to manipulate various electoral rules and procedures in and beyond districting for political advantage.<sup>129</sup> Where lawmakers' efforts will be thwarted legally if their intentions are made plain, lawmakers learn quickly not to make too plain their intentions.

More importantly, Justices Stevens and Breyer appeared to regard partisanship in districting less as an unconstitutional government motivation than an illegitimate one for purposes of rational basis. Neither justice insisted the presence of *any* partisan motivation constituted automatic grounds for invalidation per se. However, there must be other reference to legitimate state interests and democratic ends by the state in the redistricting such that partisanship cannot be said to be the legislature's sole motivation. Otherwise, where "purely political 'gerrymandering' will fail to advance any plausible democratic objective"<sup>130</sup> and "where no justification other than party advantage can be found,"<sup>131</sup> the government's districting decisions could be successfully challenged under equal protection. In other words, mere partisanship does not invalidate a redistricting by its presence, but it could not serve as constitutional justification for it either.<sup>132</sup> Justice Stevens articulated the same principle by denying a "naked purpose to disadvantage a political minority would provide a rational basis"<sup>133</sup> and then focused the constitutional question in *Vieth* on "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles."<sup>134</sup>

This reasoning by Justices Stevens and Breyer became even clearer in the subsequent gerrymandering case, *LULAC v. Perry*. There, the Court rejected a gerrymandering challenge to a mid-decade redistricting in Texas, where

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129. For example, a 2011 presentation by Tom Hofeller, a Republican redistricting consultant, detailed the importance of secrecy in redistricting work and underscored that "[a] journey to legal HELL starts with but a single misstatement OR a stupid email!" See DALEY, *supra* note 23, at 44.

130. *Vieth*, 541 U.S. at 355 (Breyer, J., dissenting).

131. *Id.* at 367.

132. See Fallon, *supra* note 13, at 554–57 (distinguishing between forbidden intent as grounds for automatic invalidation as opposed to simple invocation of further judicial scrutiny).

133. *Vieth*, 541 U.S. at 336–37 (Stevens, J., dissenting); cf. *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (striking down the Defense of Marriage Act under equal protection as unconstitutionally motivated by animus against same-sex couples); *Romer v. Evans*, 517 U.S. 620, 632–36 (1996) (ruling that bare animus to disadvantage a group, even outside a fundamental right or protected class, does not qualify as a legitimate state interest under rational basis); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (concluding equal protection "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" (emphasis omitted)).

134. *Vieth*, 541 U.S. at 339; cf. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (explaining a statute is not necessarily unconstitutional under the Establishment Clause simply because it is motivated by religious intent unless it is motivated entirely by intent to advance religion and has no secular purpose at all); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 118 (2002) (explaining the secular purpose requirement as policing objective legislative outcomes rather than subjective legislative inputs).

the state chose to redraw district lines a second time after the state's decennial obligation had already been met.<sup>135</sup> This departure from usual practice, without constitutional obligation, appeared to be entirely an effort to increase Republican partisan advantage, which the state did not deny by offering any alternate grounds for its decision.<sup>136</sup> For the *LULAC* plurality on the question, the state's entirely partisan purpose for the mid-decade redistricting did not make it an unconstitutional partisan gerrymander. According to Justice Kennedy's ongoing reasoning, there was still no sufficiently objective standard by which to decide whether the partisan effect of the gerrymander was excessive to the point of unconstitutionality.<sup>137</sup>

For Justices Stevens and Breyer, the facts of the case made clear the redistricting's "sole purpose of advantaging Republicans and disadvantaging Democrats," regardless of the actual magnitude of the resulting partisan advantage.<sup>138</sup> The crux of the question was not the excessiveness of the partisan gerrymander but whether state action was supported by any legitimate state interest. The unique facts of *LULAC* laid bare that the re-redistricting was motivated entirely by a desire to maximize partisan advantage such that the state did not try hard to justify the plan on nonpartisan grounds.<sup>139</sup> The obvious conclusion that "desire for partisan gain was the sole factor motivating the decision to redistrict" meant that the state failed its "constitutional requirement that state action must be supported by a legitimate interest."<sup>140</sup> Partisanship by itself didn't count.

This coherent account of the law of partisan gerrymandering has largely been forgotten from *Vieth*. Justice Scalia leveraged the consensus that partisan motivations in redistricting were unavoidable and not per se unconstitutional into a confident declaration that partisanship was a legitimate state interest in redistricting. As a result, gerrymandering has been understood to be unconstitutional only if taken to excess, a level that thus far has not been objectively defined by some manageable standard. Note that in *Vieth* itself, even Justice Kennedy appeared to strain away from adopting exactly this view. He cautioned against "a standard that turns on whether the partisan interests in the redistricting process were excessive."<sup>141</sup> He directed the inquiry instead to whether "political classifications were used to burden a

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135. *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 410–13 (2005) (plurality opinion).

136. *Id.* at 423–25 (majority opinion); *id.* at 492 (Breyer, J., concurring in part and dissenting in part).

137. *See id.* at 420 (opinion of Kennedy, J.).

138. *Id.* at 462 (Stevens, J., concurring in part and dissenting in part).

139. *Id.* at 491–92 (Breyer, J., concurring in part and dissenting in part). Texas Republicans conceded they had gerrymandered to favor Republicans over Democrats, but did so in part to correct the pro-Democratic bias of the preexisting districting map implemented by a federal district court. *See Henderson v. Perry*, 399 F. Supp. 2d 756, 768–69 (E.D. Tex. 2005), *aff'd in part, rev'd in part sub nom. LULAC*, 548 U.S. 399.

140. *LULAC*, 548 U.S. at 462–63 (Stevens, J., concurring in part and dissenting in part).

141. *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring in the judgment).

group's representational rights," airily suggesting patronage cases under the First Amendment as possible guidance in this direction.<sup>142</sup> Focused on intent, Justice Kennedy observed that "[i]f a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation . . . ' we would surely conclude the Constitution had been violated."<sup>143</sup> But two years later, Justice Kennedy shrugged off citations to his earlier attention to partisan purpose in the *LULAC* case, where just such partisan motivations seemed to predominate.

A shift in focus from Justice Scalia's question of partisan excess to Justice Stevens's question of legitimate state interest would have been momentous. Justice Stevens's purpose focus would have obviated the need to pinpoint a normative expectation of fair representation from which to measure excessive partisan effect. A purpose focus would identify partisan purpose as constitutionally illegitimate. Purpose might be identifiable from direct evidence that the legislature redistricted for partisan advantage to the exclusion of legitimate state interests, or otherwise undeniably demonstrable from the sheer magnitude of partisan effect. Although courts might still need to examine partisan effect in certain cases, they would not need to judge the magnitude of partisan effect, beyond a minimum threshold, where the courts could find partisan purpose by direct evidence, as in *LULAC*. Where direct evidence is not convincing, then courts might look to the magnitude of effect, but the inquiry would be directed toward inferring purpose, not establishing the magnitude of representational harm. In this sense, a purpose focus sidesteps the necessary identification of a normative baseline for fair representation entailed by an effects focus.

The sister decisions of *Vieth* and *LULAC* cemented the impression that the burden rests with plaintiffs to establish the excessiveness of partisan effect rather than with the government to justify the gerrymander in nonpartisan terms. This burden of establishing extreme partisan effect proved difficult to meet in the decade since those decisions. Substantively, a simple bar on government partisanship as an official basis for lawmaking, regardless of its excessiveness, was already grounded in constitutional law.<sup>144</sup> The new requirement of excessiveness, coupled with official sanction for a lesser, more moderate amount of government partisanship, was a newfound exception carved out somehow in *Vieth*. The exceptionality of this reasoning, as the basis for gerrymandering jurisprudence that followed, has been overlooked and overshadowed by the search for objective standards to satisfy Justice Kennedy after *Vieth* and *LULAC*.

It is worth noting that Justice Scalia and Justice Kennedy's insistence on an ironclad standard for partisan gerrymandering can be understood largely

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142. *Id.* at 315.

143. *Id.* at 312.

144. See *supra* notes 47–49 and accompanying text.



as a normative misdirection. If the Court had been determined to curb partisan gerrymandering, it certainly could have chosen any of the *Vieth* dissenters' standards, and lower courts could have then operationalized the standard with the multitude of quantitative measures of partisan bias and asymmetry in political science available even then.<sup>145</sup> Political scientists offered ready measures of partisan effect, quantifying any partisan asymmetry, that lower courts could have used case by case to define a threshold level of partisan asymmetry beyond which the state risked unconstitutionality.<sup>146</sup> Through case-by-case adjudication, lower courts would have helped define and distinguish an unconstitutionally excessive partisan gerrymander from a permissible gerrymander, with reference to both quantitative and qualitative markers that emerged as important over time.<sup>147</sup>

In *Vieth* itself, Justice Kennedy cited the example of *Baker v. Carr*<sup>148</sup> because just this pattern of events occurred in the development of the one person, one vote rule. The Court announced a vague principle of one person, one vote in *Baker* and *Reynolds v. Sims*, and lower courts filled in most of the doctrinal details through case by case adjudication across a diverse set of facts and cases.<sup>149</sup> The result—a rule of nearly exact equipopulation in congressional districting and 10 percent leeway in deviation for state and local districting, along with caveats and exceptions<sup>150</sup>—was not specifically contemplated by the Court in *Reynolds*, nor is it elegantly theorized by any means. Still, the Court's decision gave lower courts a green light to act on the Court's imperative of reining in severe malapportionment without the Court comprehensively defining the limits of one person, one vote *ex ante*.<sup>151</sup> Just so, *Vieth* could have roughly articulated a standard that defines

145. See, e.g., *Vieth*, 541 U.S. at 341 (Stevens, J., dissenting) (castigating the judgment in *Vieth* as "a failure of judicial will"); *id.* at 348 (Souter, J., dissenting) (discussing quantitative methods available to analyze population compactness).

146. See *id.* at 348 n.3 (Souter, J., dissenting). Plaintiffs, perhaps discouraged by *LULAC*, did not predicate gerrymandering claims on these measures until *Whitford v. Gill*. See Stephanopoulos & McGhee, *supra* note 96, at 846–47 (reporting that no post-*LULAC* plaintiffs proposed symmetry-based gerrymandering claims).

147. Indeed, if the Court affirms in *Whitford*, lower courts would subsequently engage in precisely this case-by-case process. Lower courts would apply whatever methodology the Court endorses, whether it is the efficiency gap in *Whitford* or otherwise. Even with such methodology, lower courts still have much to decide through case-by-case consideration. For instance, applying the lower court reasoning in *Whitford*, lower courts would need to decide fact intensively, case by case, whether the state exhibited the requisite partisan intent and whether any partisan effect can be justified by legitimate state prerogatives or other neutral districting factors. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 903–04, 915 (W.D. Wis. 2016), *prob. juris. postponed to hearing on the merits*, 137 S. Ct. 2268 (2017).

148. *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring in the judgment).

149. See generally Luis Fuentes-Rohwer, *Baker's Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353 (2002) (describing this doctrinal progression).

150. See *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 340–41 (4th Cir. 2016).

151. See Richard H. Pildes, Commentary, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1612 (1999) ("In theory and in doctrine, we can often identify what is troublingly

only the most egregious partisan gerrymanders as unconstitutional. Lower courts then would have applied that underinclusive standard against partisan gerrymanders as they appeared without an antecedent, perfectly theorized model of fair and effective representation sought by Justice Kennedy in *Vieth*.<sup>152</sup> Even in the absence of a standard that maps pristinely onto consensus about partisan gerrymandering, lower courts could have acted against the worst examples of partisan gerrymandering if the Court were so determined.<sup>153</sup>

The problem in *Vieth* was that too few justices *were* so determined against partisan gerrymandering. In Justice Kennedy's case, for example, the problem was not simply the absence of sufficient consensus about objective standards for judging partisanship, but also that he was insufficiently motivated to strike against partisan gerrymandering as a general matter. Justice Kennedy, after all, refused in *Vieth* itself to strike down the Pennsylvania congressional redistricting in question there, and he later refused to strike down a then-rare mid-decade redistricting in *LULAC v. Perry* as well.

In sum, courts acknowledge that partisanship regularly motivates lawmakers in legislating and administering all kinds of law, particularly law regulating the electoral process. This type of partisanship is permissible and lawful in the narrow sense that its presence does not per se disqualify the subject lawmaking as unconstitutional. Partisanship therefore is not like invidious racially discriminatory intent whereby its simple presence in the lawmaking process can serve as grounds for invalidation or otherwise define a protected class under equal protection. But partisanship is an illegitimate state purpose, even if it is not per se illegal. Courts pragmatically acquiesce to government partisanship as a fact of the lawmaking process but should not accept it as a legitimate basis for lawmaking. This is an important point, not a technical quibble. Government partisanship is tolerated as a government motivation in lawmaking as a factual matter but cannot serve as a basis for lawmaking. Justice Scalia cleverly extended the former fact to the undermine the latter in *Vieth*. He successfully extended earlier judicial tolerance for government partisanship into new constitutional acceptance of partisanship as a legitimate state interest for lawmaking, a wholly different proposition.

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unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right.”).

152. See Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1105–06 (2007).

153. See Luis Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will*, 14 CORNELL J.L. & PUB. POL'Y 423, 440–41 (2005).

## II. THE PROBLEM OF GOVERNMENT PARTISANSHIP IN CONSTITUTIONAL LAW

In this Part, I describe a norm against government partisanship across constitutional law. If Justice Scalia was right in *Vieth* that an important degree of government partisanship is permissible in redistricting, then redistricting as such is the glaring exception in constitutional law. Justice Scalia's insistence runs against a broader norm against government partisanship that has appeared under the First Amendment, Elections Clause, and Equal Protection Clause, even applied to redistricting itself. The constitutional problem is not the magnitude of partisan effect, but instead the fact of government discrimination based on political party in the regulation of the democratic process. Where the Constitution regulates the law of democracy, courts often have acted to cut off official government partisanship, irrespective of how extreme or moderate the partisanship, and they are now increasingly doing so in response to today's hyperpolarized partisanship.

### A. First Amendment Law

Justice Kennedy's invocation of the First Amendment in *Vieth* was surprising. Equal protection jurisprudence had always guided judicial review of partisan gerrymandering.<sup>154</sup> Courts asked whether the deliberate manipulation of district lines enabled the majority party to control a greater proportion of seats than it otherwise would be fairly entitled to claim. The trouble, as always, was in determining the fair entitlement under any inevitably contestable normative baseline. In *Vieth*, Justice Kennedy continued this storyline by endorsing gerrymandering's justiciability under equal protection and tasking litigants and courts with inventing an objective measure of partisan unfairness that would rescue him from the murkiness of a contestable normative baseline and definitively identify fair entitlements for him.<sup>155</sup> Yet in the midst of his opinion Justice Kennedy mysteriously veered off to suggest that "[t]he First Amendment may be the more relevant constitutional in future cases that allege unconstitutional partisan gerrymandering."<sup>156</sup>

The unexpected invocation of the First Amendment offers a healthy reminder of how firmly entrenched the requirement of government nonpartisanship is in the rest of constitutional law. As Justice Kennedy pointed out, the First Amendment instantiates a powerful interest against state action "burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or

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154. See Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 254 (2006) (explaining that "litigants and the Court have relied primarily on the Equal Protection Clause to challenge and judge the structure of election districts").

155. See *Vieth v. Jubelirer*, 541 U.S. 267, 311–13 (2004) (Kennedy, J., concurring in the judgment).

156. *Id.* at 314.

their expression of political views.”<sup>157</sup> The concern is precisely the plaintiffs’ constitutional complaint in any partisan gerrymandering case.<sup>158</sup> They argue that the state discriminated to disadvantage the plaintiffs’ party’s electoral prospects and favor the majority party’s.<sup>159</sup> This discrimination occurred not incidentally in pursuit of other state interests in redistricting but intentionally, as a partisan plan to punish those with competing political views and associations.<sup>160</sup>

The best illustration of this norm against government partisanship in First Amendment law is the political patronage cases. For this reason, Justice Stevens repeatedly cited them in his gerrymandering opinions as foundation for the principle.<sup>161</sup> In the patronage cases, the Court struck down traditional practices of political patronage where government officials regularly replaced incumbent staff with fellow partisans as a reward for their party work and loyalty.<sup>162</sup> Over a series of decisions, the Court outlawed longstanding historical practices, particularly in big cities, that underpinned major party politics and mass mobilization.<sup>163</sup> In this light, what is odd about *Vieth* is how blithely Justice Scalia accepted intentional partisanship in districting against this backdrop.<sup>164</sup>

The patronage cases flowed from a basic constitutional norm against official government partisanship. The government may not condition government employment decisions on partisan affiliation because doing so violates constitutional prohibitions on government favoritism based on political beliefs.<sup>165</sup> As the Court explained, patronage practices not only burden political belief under the First Amendment, but also impose a structural harm on the democratic process.<sup>166</sup> Patronage, by conditioning public employment on party loyalty, enables the incumbent government to “starve political opposition by commanding partisan support, financial and otherwise.”<sup>167</sup> The Court reasoned that patronage impermissibly enlists government authority for partisan purposes and “thus tips the electoral process in favor of the incumbent party.”<sup>168</sup> The only exception to this constitutional prohibition

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157. *Id.*

158. *E.g.*, *Davis v. Bandemer*, 478 U.S. 109, 115 (1986) (plurality opinion) (“[T]his suit was filed by several Indiana Democrats . . . alleging that the 1981 reapportionment plans constituted a political gerrymander intended to disadvantage Democrats.”).

159. *E.g.*, *id.*

160. *E.g.*, *id.*

161. *Vieth*, 541 U.S. at 324–25 (Stevens, J., dissenting).

162. *E.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

163. *E.g.*, *Rutan*, 497 U.S. at 75.

164. *Vieth*, 541 U.S. at 293–94 (plurality opinion).

165. *E.g.*, *Elrod*, 427 U.S. at 356–57.

166. *Id.* at 356.

167. *Id.*

168. *Id.*

on party patronage applies to policymaking employees for whom partisanship serves as a critical proxy for political kinship intrinsic to the position.<sup>169</sup> In familiar fashion, government employment based on partisanship can be justified only when the government can claim the use of partisanship for an important coinciding interest.<sup>170</sup>

In the general case, the constitutional bar on party patronage does not vary with the egregiousness of the partisanship. A constitutional violation arises from the simple fact that the employment decision was based on partisanship rather than legitimate hiring criteria, not that the magnitude of partisanship exceeded some allowable minimum amount. Nor does the case law allow for the government to hire and fire a small number of employees based on partisanship, drawing a constitutional bar only at some higher threshold or percentage of government employees. The problem is simply that partisanship drives the government decision and disqualifies it in the absence of other legitimate hiring justification.<sup>171</sup> The basic constitutional prohibition on government partisanship is one of kind, not degree.

Of course, courts have not always needed to lead the charge in reifying a norm of government nonpartisanship. The constitutional rule against party patronage practically applies only to the minority of non-civil service employees because legislatures already have preempted such practices for civil service employees with statutory prohibitions on government politicking and electioneering.<sup>172</sup> At the federal level, the Pendleton and Hatch Acts inaugurated legal restrictions on lawmakers from using their capacities as government officials and control over state authority for partisan purposes.<sup>173</sup> In similar fashion, campaign finance laws regularly prohibit lawmakers from using government resources to fundraise and electioneer.<sup>174</sup> A norm against government partisanship has been sufficiently internalized as a matter of self-regulation that courts have not needed to impose it on elected officials much beyond the context of the Court's patronage cases.

To be clear, elected officials themselves are party actors free to politick and electioneer on a partisan basis in their individual capacities as citizens, candidates, and political figures. Nothing in a norm against government partisanship prohibits a party official from endorsing other candidates or campaigning along party lines, or advancing partisan priorities as a policy

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169. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 71 n.5 (1990).

170. *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

171. See *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016) (holding that the government's partisan reason for its employment decision is decisive, not the degree to which the government actually impedes protected activity).

172. See, e.g., Megan Glasheen, Student Article, *Patronage Employment Practice and the First Amendment*, 34 *How. L.J.* 663, 667–68 (1991) (“All of the states have enacted some form of civil service legislation.”).

173. See, e.g., Louis Lawrence Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 *J.L. & Pol.* 243, 246–60 (1991) (describing this history).

174. E.g., 18 U.S.C. § 602 (2012).

agenda—such activities define democratic elections and public life. The distinction is that lawmakers cannot leverage official *state action* for such explicitly partisan activities.

As an example, lawmakers cannot pass a law that expressly and officially endorses certain candidates or parties, because it would constitute the lawmakers not merely politicking on an individual basis but manipulating the state as a partisan organ to sponsor their parochial cause.<sup>175</sup> To use Robert Post's words, the government in such a case would "act in its own name as a representative of the community"<sup>176</sup> and violate overlapping constitutional norms against government partisanship and viewpoint discrimination. Although this precise hypothetical apparently has never taken place, or at least has not yet been litigated in a reported case, judges and scholars have regularly cited this exact hypothetical to illustrate the nonpartisanship principle. Justices Black and Harlan drew upon the hypothetical of a state fund for partisan electioneering to make their case against compulsory union dues for the same such purposes in the companion cases *International Ass'n of Machinists v. Street* and *Lathrop v. Donohue*. Arguing by analogy, they asserted it went without saying that the state would not be permitted under the First Amendment to "create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates."<sup>177</sup> More recently, Justice Scalia himself observed in *National Endowment for the Arts v. Finley* that "it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party" or "for the government itself to promote candidates nominated by the Republican Party."<sup>178</sup> The same hypothetical of official government partisanship again arose in oral argument for *Walker v. Sons of Confederate Veterans*, when Justice Kagan asked skeptically whether a state could produce a "Vote Republican" but not a "Vote Democrat" license plate.<sup>179</sup> In each instance, justices were dismissive of official government partisanship as an absurd hypothetical illustrative of what is clearly forbidden.<sup>180</sup>

175. Thanks to Pam Karlan for posing this hypothetical to me long ago.

176. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 184 (1996) (emphasis omitted).

177. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 788 (1961) (Black, J., dissenting); *Lathrop v. Donohue*, 367 U.S. 820, 853 (1961) (Harlan, J., concurring in the judgment) (quoting *Street*, 367 U.S. at 788).

178. 524 U.S. 569, 598 n.3 (1998) (Scalia, J., concurring in the judgment). Oddly, though, Justice Scalia maintained that he did "not think that that unconstitutionality has anything to do with the First Amendment." *Id.*

179. See Frederick Schauer, *Not Just About License Plates: Walker v. Sons of Confederate Veterans*, *Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 274 n.23.

180. See also *Schulz v. State*, 654 N.E.2d 1226, 1230 (N.Y. 1995) (asserting it "unassailable that the use of public funds . . . to pay for the production and distribution of campaign materials for a political party or a political candidate or partisan cause in any election" would be unconstitutional); *Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976) ("A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions.").

Scholars widely agree along these lines. Justice Kagan, while still a law professor at the University of Chicago, wrote that a law “prohibiting the use of billboards for political advertisements supporting Democrats” would be obviously unconstitutional as prohibited viewpoint discrimination, even if a law prohibiting the use of billboards for *all* political advertisements might be able to pass constitutional standards as merely content based.<sup>181</sup> Nelson Tebbe likewise dismisses the constitutionality of “an official [government] campaign urging citizens to ‘Vote Democrat’ in the days leading up to a critical election.”<sup>182</sup> He argues that government politicking has been largely barred extrajudicially by statute and regulation, rather than judicial decision, but it would nonetheless violate constitutional commitments to an independent democratic process as a check on the government and to collective self-determination motivated by public interests.<sup>183</sup> Abner Greene agrees that the government cannot engage in official speech that “favors views supportive of the current administration or majority party while disfavoring views of the opposition.”<sup>184</sup> He argues that such government speech would violate the First Amendment because such “viewpoint-based funding tends toward entrenching the current ruling party, and blocks the paths of political change.”<sup>185</sup> Fred Schauer adds that the First Amendment rarely restricts government speech but agrees that “if parties or officials in power use their control over government resources to secure their own reelection, the dangers to the democratic processes, and thus to larger First Amendment concerns, again seem apparent.”<sup>186</sup>

For all these reasons, invocation of the First Amendment against partisan gerrymandering is intuitively apt, if not immediately obvious to all. The robust First Amendment interest against government partisanship dovetails with concerns about deliberate manipulation of district lines by the government to advantage the majority party at the expense of the opposition. Not only did Justice Kennedy refer to the First Amendment in *Vieth*, but Justice Stevens too cited the patronage decisions for the basic constitutional principle of government nonpartisanship. Justice Stevens argued the patronage cases demonstrate, contrary to Justice Scalia’s claims, that “partisanship is not always as benign a consideration as the plurality appears to assume.”<sup>187</sup> If it is unconstitutional for the state to discriminate on the basis of politics

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181. Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996).

182. Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 651 (2013).

183. *Id.* at 669–70.

184. Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 37 (2000).

185. *Id.* at 38; *see also* Levitt, *supra* note 14 (manuscript at 23–24) (criticizing a tax on members of only one party in similar terms).

186. Schauer, *supra* note 179, at 274; *see also* LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 90, 101–02 (2005); Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 ELECTION L.J. 288, 289 (2014).

187. *Vieth v. Jubelirer*, 541 U.S. 267, 326 (2004) (Stevens, J., dissenting).

for employment, Justice Stevens argued that “[i]t follows that political affiliation is not an appropriate standard for excluding voters from a congressional district.”<sup>188</sup>

In fact, the Court earlier had offered similar reasoning in the so-called partisan fencing case of *Carrington v. Rash*.<sup>189</sup> In facts unthinkable today, the Texas Constitution once disqualified from voting in state elections any member of the U.S. military who moved to the state while in active service.<sup>190</sup> The state defended this denial of the vote to otherwise eligible residents by citing an interest in protecting the Texas electorate from “infiltration by transients” and becoming overwhelmed by the “concentrated balloting of military personnel.”<sup>191</sup> The Court in *Carrington* struck down as unconstitutional this deliberate “‘fencing out’ from the franchise” of certain citizens based on their political views.<sup>192</sup> The state was entitled to condition eligibility to vote on bona fide residency, but the state here was impermissibly depriving military members of the vote because of “a fear of the political views of a political group.”<sup>193</sup>

In *Shapiro v. McManus*, a federal district court recently applied similar reasoning in allowing a First Amendment challenge to a Maryland partisan gerrymander. The district court cited the patronage cases for “the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights.”<sup>194</sup> The government strategically shifted Republican voters from the traditionally Republican Sixth Congressional District to the traditionally Democratic Eighth District.<sup>195</sup> The Republican voters’ former representative in the Sixth District lost the subsequent election to a Democratic challenger, while they themselves were outvoted by a two-to-one Democratic majority in the Eighth District.<sup>196</sup> The result of the gerrymander was that Democrats won control of both districts and these Republican voters, the plaintiffs in *Shapiro*, were now represented by a Democrat in a new district rather than their former in-party Republican incumbent.<sup>197</sup> The district court held that government

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188. *Id.* at 325; see also *Baldus v. Members of the Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 853 (E.D. Wis. 2012) (“If, as the Supreme Court has held, the First Amendment protects persons from politically-based hiring decisions, then perhaps the Court will find some day that the First Amendment also protects persons against state action that intentionally uses their partisan affiliation to affect the weight of their vote.” (citations omitted)).

189. 380 U.S. 89 (1965).

190. *Carrington*, 380 U.S. at 89.

191. *Id.* at 93.

192. *Id.* at 94.

193. *Id.* at 93–94.

194. 203 F. Supp. 3d 579, 596, 598 (D. Md. 2016); see also *Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 410 (D. Md. 1991) (Niemeyer, J., dissenting) (articulating similar reasoning in dissent from an earlier case), *aff’d mem.*, 504 U.S. 938 (1992).

195. *Shapiro*, 203 F. Supp. 3d at 587–88.

196. *Id.* at 588.

197. *Id.*



could not “burden the representational rights of certain citizens because of how they had voted in the past and the political party with which they affiliated.”<sup>198</sup> Just as government could not punish its employees for their political views, the court reasoned, the government could not purposely disadvantage voters in redistricting for their political views by tangibly diminishing the chance for electoral success.<sup>199</sup>

Admittedly, *Shapiro* is exceptional in allowing a First Amendment claim against partisan gerrymandering since *Vieth*. Other district courts to have considered such a theory have rejected it on the ground that the First Amendment simply does not apply to the burdening of representational rights in districting.<sup>200</sup> These courts routinely defer to *Vieth* as authority against constitutional challenges of redistricting even though the plaintiffs in these cases sue under the First Amendment, rather than bringing Fourteenth Amendment claims as analyzed in *Vieth*.<sup>201</sup> For most courts, *Vieth* still casts a dark shadow of presumptive skepticism about partisan gerrymandering claims regardless of the doctrinal specifics.<sup>202</sup> More importantly, these courts uniformly find that the plaintiffs fail to show a cognizable injury under the First Amendment because they are still, in the words of one court, “every bit as a free . . . to run for office, express their political views, endorse and campaign for their candidates, vote, or otherwise influence the political process through their expression.”<sup>203</sup> These courts therefore seem to reason that a First Amendment claim based on government discrimination must allege some affirmative restriction on the plaintiffs’ First Amendment activity. The injury caused by partisan gerrymandering, these courts reason, is instead a diminishment in the chance for electoral success. In the absence of a constitutional guarantee of any political success in the first place, they conclude there cannot be a claim to constitutional harm and violation of right.<sup>204</sup> In short, district courts considering this First Amendment claim convert it essentially into one brought under the Fourteenth Amendment, as in *Vieth*, about representational injury. It is no surprise then that these lower courts

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198. *Id.* at 597.

199. *Id.*

200. See *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 575 (N.D. Ill. 2011); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at \*7–8 (N.D. Ill. Oct. 21, 2011); *Kidd v. Cox*, No. 1:06-cv-0997-BBM, 2006 WL 1341302, at \*15–20 (N.D. Ga. May 16, 2006). For earlier cases predating the Court’s decision in *Vieth*, see *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 548 (M.D. Pa.), *appeal dismissed*, 537 U.S. 802 (2002); *Washington v. Finlay*, 664 F.2d 913, 927–28 (4th Cir. 1981); and *Badham v. Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988), *aff’d*, 488 U.S. 1024 (1989).

201. See, e.g., *Comm. for a Fair & Balanced Map*, 835 F. Supp. 2d at 575.

202. See, e.g., *id.*

203. *Kidd*, 2006 WL 1341302, at \*17.

204. See, e.g., *Comm. for a Fair & Balanced Map*, 835 F. Supp. 2d at 575 (“[W]hile it is true that the redistricting plan undoubtedly means that one party is more likely to be victorious in any given district, the First Amendment . . . does not ensure that all points of view are equally likely to prevail.” (quoting *League of Women Voters v. Quinn*, No. 1:11-cv-5569, 2011 WL 5143044, at \*4 (N.D. Ill. Oct. 28, 2011))).

end up in the same place as the Court itself reached in *Vieth*—no baseline or manageable standard for measuring representational harm, so no constitutional claim.

The alleged harm from partisan gerrymandering under the First Amendment is not just a diminishment in chances of electoral victory, but the constitutional harm of purposeful government discrimination. Just as it would be unconstitutional for the government to favor Democrats over Republicans in employment decisions, or to endorse the Democratic Party over the Republican Party, the claim is that it would be similarly unconstitutional for the government to intentionally discriminate in favor of Democrats over Republicans in the redistricting process. The harm is not merely the tangible diminishment in electoral success resulting from gerrymandering, but the intentional government effort to favor one party over the other, at least in the absence of a neutral government justification for its decisions. As the *Shapiro* court rightly put it, the core harm is when “the legislature specifically intended to burden the representational rights of certain citizens because of how they had voted in the past and the political party with which they had affiliated.”<sup>205</sup> The fact that a gerrymander reduces those citizens’ chances of electoral victory is critical evidence of the government’s discriminatory purpose rather than the exclusive harm itself.

Party members may not have any constitutional entitlement to electoral success, but they should have a constitutional expectation against the government purposefully burdening their representational interests based on their partisan affiliation and beliefs. Furthermore, the government may take political considerations into account in redistricting, just as the Court has repeatedly assured.<sup>206</sup> As the *Shapiro* court explained, “[W]hat implicates the First Amendment’s prohibition on retaliation is not the use of data reflecting citizens’ voting history and party affiliation, but the use of such data for the purpose of making it harder for a particular group of voters to achieve electoral success.”<sup>207</sup> The government can consider the inherently political consequences of redistricting and even attend to political interests in the process. It may even pursue legitimate government interests in redistricting, like compliance with the Voting Rights Act, in ways that practically benefit one party more than another. There is no guarantee of nondiscriminatory results in redistricting, at least not yet under existing law. Instead, what would be prohibited under this approach is purposeful government discrimination in redistricting against a party or based on political beliefs. This approach refers back to the overarching constitutional norm of government nonpartisanship that echoes through other areas of constitutional law.

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205. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 597 (D. Md. 2016).

206. See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“The reality is that districting inevitably has and is intended to have substantial political consequences.”).

207. *Shapiro*, 203 F. Supp. 3d at 596.

### B. *Equal Protection and Second-Order Review of Redistricting*

Despite *Vieth*'s ambivalence toward partisan gerrymandering, the constitutional norm of government nonpartisanship still exercises an influence in equal protection challenges to redistricting. Admittedly, *Vieth* sent a clear signal to lower courts that some partisanship in redistricting is lawful and permissible. To establish an equal protection claim against partisan gerrymandering, plaintiffs needed to objectively demarcate lawful partisanship from some greater, impermissible level of excessive partisanship that equal protection should not tolerate.<sup>208</sup> As a result, *Vieth* largely stalled equal protection challenges to partisan gerrymandering as lower courts struggled to grapple with *Vieth*'s acquiescence to common partisanship in redistricting. Courts generally dismissed these challenges, sometimes dismissing them under the old *Bandemer* standard, sometimes finding that the plaintiffs failed to offer a satisfactory new standard under *Vieth*, and sometimes concluding that such claims were no longer justiciable after *Vieth*.<sup>209</sup> Notwithstanding *Vieth*'s impact, however, courts expressed the norm against government partisanship in related but distinct challenges to gerrymandering under equal protection—as violations of one person, one vote.

Courts have developed what has been called a “second-order” judicial check on partisan gerrymandering through the one person, one vote doctrine.<sup>210</sup> In *Larios v. Cox*, Republicans challenged the post-2000 Georgia state legislative redistricting under one person, one vote.<sup>211</sup> Georgia Democrats at the time of the redistricting maintained a tenuous majority in both houses that they intended to protect by stretching to the limit all traditional redistricting criteria. The Democrats believed their redistricting would qualify for an unofficial “safe harbor” against one person, one vote challenges, based on previous court rulings, if they kept the population deviation between the largest to the smallest district under 10 percent.<sup>212</sup> They thus produced a map with a maximum deviation of 9.98 percent, just barely within their putative safe harbor.<sup>213</sup> By careful design, however, it was overwhelmingly the Republican-leaning districts that were overpopulated. The district court found that sixty-nine overpopulated districts were Republican-leaning compared to just thirty Democratic-leaning ones.<sup>214</sup> Republican voting strength was therefore packed into fewer districts, while expected Democratic voters were spread more efficiently across more districts, a hallmark of partisan

208. See *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment).

209. See Kang, *supra* note 152, at 1111–12 (surveying lower court decisions in *Vieth*'s wake).

210. Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 567 (2004).

211. 300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), *aff'd mem.*, 542 U.S. 947 (2004).

212. See *Larios*, 300 F. Supp. 2d at 1325.

213. *Id.* at 1352.

214. See *id.* at 1331.

gerrymandering. Furthermore, the resulting partisan gerrymander pitted forty-seven Republican incumbents against other incumbents, including half the Republican caucus in the lower house, compared to only nine out of 105 Democratic incumbents forced to face a fellow incumbent.<sup>215</sup> The predictable result was that twenty-two Republican incumbents lost in the subsequent 2002 elections compared to just three Democrats.<sup>216</sup> Democrats managed to extend their majority in the House, despite state demographics running dramatically away from their party.<sup>217</sup> They nearly retained the state senate before four victorious Democratic senators switched parties immediately after the election to hand the Republicans a new majority.<sup>218</sup>

Although the district court dismissed the Republican plaintiffs' *Bandemer* claims of unconstitutional gerrymandering, the district court instead struck down the Democratic gerrymander for violating one person, one vote. The court explained that population deviations satisfy the requirement of one person, one vote only when supported by legitimate state interests in redistricting, but not when tainted by arbitrariness or discrimination.<sup>219</sup> The state could defend population deviations from one person, one vote as necessary to pursue traditional redistricting criteria, including incumbency protection, respect for political subdivisions, and preservation of previous district cores, among other things. The Georgia redistricting, though, was "not supported by *any* legitimate, consistently-applied state interests," and rather resulted from the "blatantly partisan and discriminatory" objective of advantaging Democratic incumbents and voters in southern Georgia and inner-city Atlanta who favored them.<sup>220</sup> While the state pointed to traditional redistricting criteria to explain its population deviations, the court observed that the state selectively pursued them only when they favored Democrats, taking pains to protect only Democratic incumbents and the cores of mainly Democratic districts at the expense of Republicans.<sup>221</sup> The court concluded that one person, one vote requires "at least some plausible and consistently applied state interest to justify it," and critically, the obvious partisanship motivating the Georgia redistricting did not qualify as a legitimate state interest for this purpose.<sup>222</sup>

Only two months after the Supreme Court put a damper on gerrymandering claims in *Vieth*, it summarily affirmed the district court decision in

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215. *See id.* at 1329–30.

216. *See id.*

217. Republicans won a comfortable majority of votes statewide in the 2002 elections while losing a majority of the legislative races in both houses. *See Larios v. Cox*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring).

218. *Larios*, 300 F. Supp. 2d at 1326–27.

219. *Id.*

220. *Id.* at 1347, 1352–53.

221. *Id.* at 1347–51.

222. *Id.* at 1352.

*Larios*.<sup>223</sup> In unusual concurring and dissenting opinions to summary affirmance, Justices Stevens and Scalia replayed their colloquy from *Vieth*. Justice Stevens cheered this new indirect method of challenging partisan gerrymanders under one person, one vote as “the only clear limitation on improper districting practices” after *Vieth*.<sup>224</sup> Joined again by Justice Breyer, he decried the Georgia redistricting as “an impermissible partisan gerrymander” that violated the state’s “fundamental duty to govern impartially.”<sup>225</sup> Justice Scalia countered that summary affirmance in *Larios* contradicted the Court’s freshly minted decision in *Vieth*. The problem with *Larios*, he insisted, was that the district court assumed that partisanship was not a traditional redistricting criterion that would constitutionally justify deviations from one person, one vote.<sup>226</sup> But according to Justice Scalia, *Vieth* itself demonstrated that “all but one of the Justices agreed that it is a traditional criterion, and a constitutional one, so long as it does not go too far.”<sup>227</sup> Nonetheless, the Court summarily affirmed *Larios*, notwithstanding any conflict with *Vieth*.<sup>228</sup>

The odd consequence is that courts are baffled under *Vieth* by direct equal protection claims of unconstitutional gerrymandering, but under *Larios*, they are empowered to recognize indirect claims of essentially the same thing on the alternate grounds of one person, one vote. For this reason, Sam Issacharoff and Pam Karlan dub this indirect claim as “second-order adjudication of political gerrymandering” that applies a haphazard and inconsistent restraint on partisanship in redistricting.<sup>229</sup> Setting aside its effectiveness in restraining partisan gerrymandering, *Larios* and the redirection of gerrymandering claims into one person, one vote demonstrate the influence of the constitutional norm of government nondiscrimination. Where *Vieth* seems to cut off judicial intervention, the norm arguably compels its own hydraulic reassertion elsewhere through alternate constitutional means because the principle against government partisanship is so compelling in this context.

Even before *Larios*, lower courts were willing to strike down partisan gerrymanders under one person, one vote where the partisan purpose seemed sufficiently egregious. In *Hulme v. Madison County*, the district court struck down a county board reapportionment with a maximum deviation of just 9.3 percent because of “boorish” partisanship that “demonstrated the worst of politics.”<sup>230</sup> What offended the district court in *Hulme*

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223. 542 U.S. 947 (2004).

224. *Larios*, 542 U.S. at 949 (Stevens, J., concurring).

225. *Id.* at 950–51 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 341 (2004) (Stevens, J., dissenting)).

226. *Id.* at 952 (Scalia, J., dissenting).

227. *Id.*

228. See *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1310 (2016).

229. Issacharoff & Karlan, *supra* note 210, at 567–69.

230. 188 F. Supp. 2d 1041, 1044, 1047, 1051, 1055–56 (S.D. Ill. 2001).

was not the partisan extremeness of the reapportionment map, which merited little mention from the court, but instead the overweening partisan malice pervading the redistricting process.<sup>231</sup> A Democratic member of the county board announced outright at a preliminary meeting that the process “was going to be partisan” and later, the chairman of the apportionment committee responded to Republican complaints about the process by answering that “[w]e are going to shove it [the map] up your f\_\_\_\_; ass and you are going to like it, and I’ll f\_\_\_\_ any Republican I can.”<sup>232</sup> Based on ample evidence of this sort about the process, the district court concluded that the chairman’s intent was “to create districts that would not simply disadvantage Republican members of the Board, but ‘cannibalize’ their districts to the greatest extent possible.”<sup>233</sup> Worse, the government did not offer any state policy to justify the resulting population deviation from one person, one vote.<sup>234</sup> It instead relied entirely on what it saw as an absolute 10 percent safe harbor, not unlike the state of Georgia in *Larios*.<sup>235</sup> Indeed, courts routinely permit population deviations of less than 10 percent for state and local districts under one person, one vote when such deviations are justified in terms of traditional redistricting criteria.<sup>236</sup> But here the district court struck down the reapportionment within this safe harbor when the undeniable explanation for the deviation was raw partisanship. The obvious partisan purpose throughout the process, without intervening state interests to justify the government’s deviation from equipopulosity, implored the district court to rule against it despite minimal analysis of the redistricting’s actual effects.

Even in *Vieth* itself, the district court below actually struck down the Pennsylvania congressional reapportionment on one person, one vote grounds.<sup>237</sup> The population deviation in *Vieth* was trivial, a difference of nineteen voters from largest to smallest across nineteen districts.<sup>238</sup> Yet again, these details of the redistricting mattered less than what the court suspected was obvious partisanship motivating the choices in the absence of any countervailing explanation. The district court found the state’s explanation of the population deviation as necessary to avoid splitting voting precincts to be “mere pretext,” with “logical inconsistency . . . so deep that it causes us to

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231. See *Hulme*, 188 F. Supp. 2d at 1051–52.

232. See *id.* at 1051.

233. *Id.*

234. *Id.* at 1052 (“Defendants have not offered any state (governmental) policy to justify the plan’s population disparity.”).

235. See *id.*

236. See *Brown v. Thomson*, 462 U.S. 835, 842 (1983); Margaret H. Lemos & Alex Stein, *Strategic Enforcement*, 95 MINN. L. REV. 9, 41–43 (2010) (describing the “ten percent rule” and collecting cases); Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1012–14 (2005) (describing the “Ten Percent Rule”).

237. See *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 678 (M.D. Pa.), *appeal dismissed*, 537 U.S. 802 (2002).

238. *Id.* at 674.

pause and consider the sincerity of such proffer.”<sup>239</sup> The court noted that an alternative map with zero deviation would have been simple to produce and implied that partisanship was to blame.<sup>240</sup> To the degree that the redistricting retained cores of prior districts, it did so only for Republican incumbents, and to the degree that it supposedly strove to avoid contests between incumbents, it still pitted five Democratic incumbents and only one Republican incumbent against a fellow incumbent.<sup>241</sup> Again the government’s bald partisanship mattered more than the political result of the putative violation, a trivial nineteen-person population deviation dwarfed by the statistical margin of error.

Post-*Larios*, courts have further refined this analysis under one person, one vote. In *Harris v. Arizona Independent Redistricting Commission*, Justice Breyer’s opinion for a unanimous Supreme Court explained that the plaintiffs must show it is more probable than not that the population deviation of less than 10 percent “reflects the predominance of illegitimate reapportionment factors rather than the ‘legitimate considerations’” that the Court has previously recognized as traditional districting criteria.<sup>242</sup> In that case, the plaintiffs alleged that the state’s bipartisan redistricting commission produced a state legislative map that deviated from equipopulosity because of “the Commission’s political efforts to help the Democratic Party.”<sup>243</sup> They pointed to the fact that, similar to *Larios*, Democratic-leaning districts tended toward underpopulation and Republican-leaning districts tended toward overpopulation, as signal evidence of this partisanship.<sup>244</sup> Still, the Court rejected this claim because the independent commission’s process and deliberations supported the district court’s findings that the commission was instead motivated primarily by good-faith efforts to comply with the Voting Rights Act in producing a population deviation of 4.07 percent.<sup>245</sup> This conclusion was obviously bolstered by the fact that the redistricting was conducted by an independent commission, chosen by a putatively apolitical and bipartisan method, rather than the usual legislative process.<sup>246</sup>

*Harris* adapts Justice Stevens and Breyer’s approach to partisan gerrymandering in *Vieth* to one person, one vote. Although Justice Stevens had

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239. *Id.* at 677.

240. *Id.* at 678 (“It has been conclusively proven that it is possible to draw a congressional district map with zero population deviation amongst districts without splitting any precincts.”).

241. *Id.*

242. 136 S. Ct. 1301, 1304, 1307 (2016).

243. *See Harris*, 136 S. Ct. at 1305, 1307.

244. *See id.* at 1309.

245. *Id.* at 1308–09; *see also Harris v. Ariz. Indep. Redistricting Comm’n*, 993 F. Supp. 2d 1042, 1080 (D. Ariz. 2014) (concluding that “compliance with the Voting Rights Act is a legitimate state policy that can justify minor population deviations, that . . . the map in large part resulted from this goal, and that plaintiffs have failed to show that other, illegitimate motivations predominated”), *aff’d*, 136 S. Ct. 1301 (2016).

246. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2661–62 (2015) (describing the selection method, enacted by popular initiative).

since retired from the Court, Justice Breyer's opinion in *Harris* adopted Stevens's proposed test from *Vieth* that the plaintiffs prove partisanship, as an illegitimate factor in redistricting, predominated over other legitimate considerations.<sup>247</sup> Justice Breyer acknowledged that the *Harris* district court found "partisanship played some role" in the commission's redistricting work.<sup>248</sup> Nonetheless, the fact of partisanship in the process by itself did not automatically disqualify the resulting plan. Partisan motive is not forbidden, but partisan purpose is *illegitimate* in redistricting such that the government could not rely exclusively on partisan interests to justify the plan against an equal protection challenge. In crafting this analysis, Justice Breyer's opinion cited *Larios* with approval, contrasting the findings there with *Harris*.<sup>249</sup> As a technical matter, Justice Breyer explicitly reserved the question whether "partisanship is an illegitimate redistricting factor."<sup>250</sup> The reasoning of *Harris*, though, makes clear that it is. Justice Breyer explained that "[n]o legitimate purposes could explain" the population deviations in *Larios*,<sup>251</sup> but of course, the district court there found that *only* regional favoritism and partisanship could explain them.<sup>252</sup> If no legitimate purpose could explain the population deviations in *Larios*, it is necessarily true that partisanship is not a legitimate purpose in redistricting despite Justice Breyer's gesture to reserve the question. With Justice Scalia's death just months earlier, Justice Breyer's opinion in *Harris* so decided for a unanimous Court.

The Fourth Circuit promptly applied this approach in *Raleigh Wake Citizens Ass'n v. Wake County Board of Elections*.<sup>253</sup> The court had previously, before *Harris*, already denied dismissal of the plaintiffs' one person, one vote claims based on its belief that the Supreme Court in *Larios* "necessarily believed to be correct the district court's rejection of discriminatory treatment of incumbents from one party over those of another," or at least its related rejection of regional favoritism.<sup>254</sup> Now on remand after *Harris*, the Fourth Circuit asked whether plaintiffs had proved more probably than not that the population deviations in the case reflected predominance of the illegitimate

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247. See *Harris*, 136 S. Ct. at 1307; cf. *Vieth v. Jubelirer*, 541 U.S. 267, 336 (2004) (Stevens, J., dissenting).

248. *Harris*, 136 S. Ct. at 1309.

249. *Id.* at 1310.

250. *Id.*

251. *Id.*

252. See *Larios v. Cox*, 300 F. Supp. 2d 1320, 1352–53 (N.D. Ga.) (per curiam) ("[The plaintiffs] have also shown that the 9.98% population deviation in those plans are not supported by *any* legitimate, consistently-applied state interests but, rather, resulted from the arbitrary and discriminatory objective of increasing the political power of southern Georgia and inner-city Atlanta . . . and from the systematic favoring of Democratic incumbents and the corresponding attempts to eliminate as many Republican incumbents as possible."), *aff'd mem.*, 542 U.S. 947 (2004).

253. 827 F.3d 333 (4th Cir. 2016).

254. *Wright v. North Carolina*, 787 F.3d 256, 267 (4th Cir. 2015).



factor of “an intentional effort to create a significant . . . partisan advantage.”<sup>255</sup> Focused on government partisan intent, the court found uncontroverted evidence that the “true motivation” of the redistricting there was to “ensure Republican control . . . at the expense of Democrats.”<sup>256</sup> The court found the Republican redistricters’ alternate explanations to be pretextual and instead credited the direct evidence of intent from witness testimony, emails among Republicans, and expert testimony that the redistricting plan’s partisan bias could have resulted only from an intentional effort to favor Republicans.<sup>257</sup> In addition, the required decennial reapportionment had earlier taken place in compliance with one person, one vote.<sup>258</sup> The Republican state government pushed through this second, mid-decade redistricting of these county boards only after partisan control of the local school board flipped from Republican to Democratic in 2011.<sup>259</sup> This unnecessary and unusual “re-redistricting” therefore resembled *LULAC* in baring the Republican state government’s partisan purposes, despite the fact that the county boards in the case were nominally nonpartisan.<sup>260</sup>

As a result, courts now seem empowered as never before to strike down partisan gerrymandering under one person, one vote. The courts above refused to recognize government partisanship as a legitimate redistricting consideration to justify even minor population deviations. *Vieth* and *LULAC* therefore seem at odds with this judicial willingness to check government partisanship in redistricting under one person, one vote. If partisanship by itself cannot justify small population deviations under one person, one vote, it is very difficult to square this fact with Justice Scalia’s insistence that partisanship in redistricting is a “traditional criterion, and a constitutional one, so long as it does not go too far.”<sup>261</sup>

### C. Election Administration and Voter Identification Laws

Support for a constitutional norm against government partisanship appears again in judicial review of election administration. First, the Court explicitly invokes a nondiscrimination norm for state election administration under the Elections Clause. Second, the nondiscrimination norm gradually has emerged as a *sub silentio* influence in judicial decisions curbing partisan voting restrictions, in particular voter identification requirements and early voting cutbacks.

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255. *Raleigh Wake Citizens Ass’n*, 827 F.3d at 345 (first citing *Harris*, 136 S. Ct. at 1307; and then citing *Cox v. Larios*, 542 U.S. 947, 947–49 (2004)).

256. *Id.* at 346.

257. *See id.* at 345–51.

258. *See id.* at 338.

259. *See id.*

260. *See id.* at 338 n.2.

261. *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting).

The Elections Clause of Article I, Section 4 of the Constitution delegates to the states authority to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives.”<sup>262</sup> As the Court has interpreted it, the Elections Clause permits state governments to create procedural regulations for congressional elections to ensure the “integrity and regularity of the election process.”<sup>263</sup> Such regulations include the determination of election dates, methods of voting, regulation of ballot access, and other election administration rules designed to produce “orderly, fair, and honest elections ‘rather than chaos.’”<sup>264</sup> The Court has also explained, however, that the Elections Clause is only a delegation of authority to make procedural regulations for congressional elections, and is not “a source of power to dictate electoral outcomes, [or] to favor or disfavor a class of candidates.”<sup>265</sup> In fact, the Court concluded from its historical survey that the framers expressly understood the Elections Clause specifically *not* to permit the states to disadvantage any particular class of candidates or impose additional qualifications for congressional candidacy.<sup>266</sup>

In other words, the Elections Clause too expresses a norm against purposeful government discrimination among candidates through the specification of election law. In *Cook v. Gralike*, the Court applied this familiar norm under the Elections Clause to state-imposed ballot notations regarding candidates’ stances on term limits.<sup>267</sup> The state of Missouri adopted a state constitutional amendment dictating that the statement “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” be printed on primary and election ballots next to the name of a U.S. senator or congressional representative who failed to take one of eight specified legislative acts in support of a term limits amendment to the U.S. Constitution.<sup>268</sup> The same law dictated that the statement “DECLINED TO PLEDGE TO SUPPORT TERM LIMITS” be printed on ballots next to the name of any congressional challenger who refused to take a term limits pledge promising to perform one of the aforementioned legislative acts.<sup>269</sup>

The Court sensibly interpreted these required ballot notations as an attempt to favor candidates who support the term limits proposal contemplated by the amendment and disfavor candidates who did not.<sup>270</sup> Although the law did not disqualify or directly instruct candidates on term limits, the

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262. U.S. CONST. art. I, § 4.

263. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995).

264. *Id.* at 834 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

265. *Id.* at 833–34.

266. *Id.* at 832–34.

267. 531 U.S. 510 (2001).

268. *See Gralike*, 531 U.S. at 514.

269. *See id.* at 514–15.

270. *Id.* at 524; *see also* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 104 (2016), [http://scholarship.law.nd.edu/ndlr\\_online/vol91/iss2/3/](http://scholarship.law.nd.edu/ndlr_online/vol91/iss2/3/) [https://perma.cc/YLL2-SLDM] (agreeing that “printing derogatory warnings next to [candidates’] names on the ballot, are direct and substantial handicaps specific to particular candidates”).

law's design was to "attach[ ] a concrete consequence to noncompliance."<sup>271</sup> The ballot notations penalized noncompliant candidates with a "Scarlet Letter" that even the law's proponent admitted would disadvantage those candidates' chances for electoral success.<sup>272</sup> The discriminatory intent of the law was to impose a derogatory signal to voters that would "handicap candidates at the most crucial stage in the election process—the instant before the vote is cast."<sup>273</sup> A unanimous Court had little trouble in finding the law unconstitutional under the Elections Clause as an attempt to disadvantage certain candidates and "dictate electoral outcomes" on the basis of the candidates' political positions.<sup>274</sup>

A few commentators argue that the Elections Clause might extend to restrict partisan gerrymandering as well.<sup>275</sup> Jamal Greene reasons that whether the ballot notations represent attempts to "dictate electoral outcomes" is actually a closer call than whether partisan gerrymandering does.<sup>276</sup> As he puts it, even defenders of partisan gerrymandering must agree that "in purposefully manipulating district lines, state legislators hope to dictate electoral outcomes at least as much as proponents of pejorative ballot labels do."<sup>277</sup> The plaintiffs in *Vieth*, though, did not press claims against partisan gerrymandering under the Elections Clause,<sup>278</sup> while the plaintiffs in *LULAC* presented only a truncated version of this theory, which the district court rejected.<sup>279</sup> Whatever the merits of their claim, the important point is not that the Elections Clause necessarily applies directly to redistricting, but instead that we again find the familiar norm against government nondiscrimination in elections as a basic value in another area of constitutional law.

The vitality of the nondiscrimination norm also helps explain how courts have evolved their constitutional approach to voter identification laws and other new cutbacks on voting rights. Voter identification laws were rare in the United States until the passage of the Help America Vote Act in

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271. *Gralike*, 531 U.S. at 524.

272. *See id.* at 525.

273. *Id.* (quoting *Anderson v. Martin*, 375 U.S. 399, 402 (1964)).

274. *Id.* at 526–27.

275. *See* Pildes, *supra* note 154; Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1023–24 (2005); Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196 (2004). *But see* Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 877–88.

276. Greene, *supra* note 275, at 1023

277. *Id.* at 1023–24; *cf.* *Session v. Perry*, 298 F. Supp. 2d 451, 516 (E.D. Tex.) (Ward, J., concurring in part and dissenting in part) (agreeing that "at some point a state exceeds the power granted to it by the Elections Clause" with partisan gerrymandering), *vacated sub nom.* *Jackson v. Perry*, 543 U.S. 941 (2004).

278. *See Vieth v. Jubelirer*, 541 U.S. 267, 272 (2004) (plurality opinion).

279. *Session*, 298 F. Supp. 2d at 458–61. The plaintiffs below in *LULAC* argued that the Elections Clause prohibited mid-decade redistricting rather than partisan gerrymandering in general. *See id.*

2002.<sup>280</sup> The most stringent of these newly enacted laws required presentation of a government-issued photo identification as a precondition to voting.<sup>281</sup> Although the specific identification requirements varied across states, the ostensible government justification for them remained constant. State governments, almost exclusively in Republican-controlled states to start, claimed voter ID laws were necessary to address the problem of in-person voter impersonation.<sup>282</sup> A person might vote illegally by appearing at the polling place and cast someone else's vote by pretending to be them. Requiring a government photo ID would prevent such imposters from doing so because they would not be able to obtain the necessary matching ID.

Straightforward application of equal protection law raised little constitutional concern about voter ID laws. Though voting is a fundamental constitutional right, the Court has recognized that the states must regulate elections to ensure order, integrity, and fairness.<sup>283</sup> And every element of election law, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself," produces some practical restriction on voting.<sup>284</sup> If every such voting regulation were subject to strict scrutiny from courts, it would bind the states from effectively administering its elections. As a consequence, only voting regulations that produce a severe burden on voting draw strict scrutiny and must be narrowly drawn to advance a compelling state interest.<sup>285</sup> "[E]venhanded restrictions that protect the integrity . . . of the electoral process" and impose a minor burden on voting receive rational basis review from courts and are generally upheld.<sup>286</sup>

The Court upheld an Indiana voter ID law under this constitutional framework in *Crawford v. Marion County Election Board*.<sup>287</sup> Voter ID laws are nondiscriminatory on their face and impose a particular burden on only a minority of voters who do not have and would encounter particular difficulty in obtaining one. Indeed, the *Crawford* plaintiffs could not produce a single Indiana voter to testify that he or she would be ultimately disenfranchised by the ID law. Given that the Court concluded there was only a limited burden on voters' rights, the Court dismissed the plaintiffs' equal protection challenge in light of the state's legitimate interest in protecting

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280. See Daniel R. Biggers & Michael J. Hanmer, *Understanding the Adoption of Voter Identification Laws in the American States*, 45 AM. POL. RES. 1, 12–13 (2017) (charting passage of voter ID laws).

281. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 183, 185–86 (2008) (plurality opinion).

282. See, e.g., *id.* at 194 ("The only kind of voter fraud that [the Indiana statute at issue] addresses is in-person voter impersonation at polling places.").

283. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

284. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

285. See *Burdick*, 504 U.S. at 434.

286. *Crawford*, 553 U.S. at 189–90 (quoting *Anderson*, 460 U.S. at 788 n.9).

287. *Id.* at 204.

the integrity of its elections from in-person voter fraud.<sup>288</sup> Lower courts immediately following *Crawford* upheld voter ID laws based on the same reasoning.<sup>289</sup>

With the spread of voter ID laws across predominantly Republican-controlled states, however, the flimsiness of the claimed government interest behind the laws became increasingly apparent. The ostensible government purpose for voter ID laws was the prevention of in-person voter impersonation, but there was virtually no credible evidence that in-person voter impersonation occurs at all. The *Crawford* Court was willing to overlook the fact that the state of Indiana could produce no actual cases of in-person voter impersonation in the state.<sup>290</sup> The Court found sufficiently plausible the risk of in-person voter impersonation that it did not require such evidence, particularly given the deference owed to the state in election administration.<sup>291</sup> But through the ongoing political clash over voter ID laws across the country, it became evident that no one could find many cases of in-person voter impersonation, and certainly nothing that would explain the rapid popularity of voter ID laws to address a problem that did not seem a problem. Justin Levitt investigated every specific allegation of voter impersonation between 2000 and 2014 and found a maximum of thirty-one possible incidents across the country, out of more than a billion votes cast, that might have been prevented by a voter ID requirement.<sup>292</sup> Another study of election fraud cases over the same period found just ten cases of voter impersonation, what it called an “infinitesimal” rate, and an update to the study, running through 2016 in five states, found no prosecutions for voter impersonation.<sup>293</sup>

The limited incidence of voter impersonation is unsurprising because, as Nate Persily summarizes, “it is an incredibly stupid and inefficient way to rig an election.”<sup>294</sup> Even without any voter ID law, in-person voter impersonation requires identification of registered voters who will not, or are at least exceedingly unlikely to vote, and then sending imposters to pretend to

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288. *Id.*

289. See, e.g., *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352–55 (11th Cir. 2009).

290. See *Crawford*, 553 U.S. at 194 (“The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.”).

291. *Id.* at 194–95.

292. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/> [https://perma.cc/M3TT-RFTF].

293. Sami Edge, *Review of States with Voter ID Laws Found No Impersonation Fraud*, TEX. TRIB. (Aug. 21, 2016, 12:00 AM), <https://www.texastribune.org/2016/08/21/review-states-voter-id-laws-found-no-voter-imperso/> [https://perma.cc/G9QR-HSDU].

294. Michael LaVigne, Comment, *Swing State Rulings on Restrictive Voting Laws Highlight the Need for Comprehensive Election Reform*, 85 U. COLO. L. REV. 505, 529 (2014) (quoting Nathaniel Persily, *Voter ID Cases: Invisible Voter v. Imaginary Fraud*, CNN (Aug. 31, 2012), <http://www.cnn.com/2012/08/31/opinion/persily-voter-id-laws/index.html> [https://perma.cc/89XG-3PU5]).

be those voters one at a time, at personal risk of criminal arrest and prosecution. Each incident depends on the imposter to vote as instructed without certainty of confirmation and yields only one vote at a time. And yet the whole effort must be coordinated on a scale that produces enough stolen votes to swing an election while avoiding detection. By comparison, absentee ballot fraud or conspiring with election administrators requires fewer participants with greater efficiency.<sup>295</sup> Indeed, it is hard to imagine why anyone interested in stealing an election would opt for in-person voter impersonation over absentee ballot fraud when the latter requires basically the same elements but permits a single person to complete and send by mail the whole set of ballots at once. For precisely this reason, other means of voter fraud appear far more common than in-person voter impersonation.<sup>296</sup>

The flimsiness of the putative government justifications for voter ID laws helped lay bare the partisan purpose actually behind them. Because racial minority and poorer voters are less likely to possess qualifying voter ID, passage of voter ID laws tends disproportionately to burden voting among these Democratic-leaning voters.<sup>297</sup> As a result, both Republicans and Democrats understand voter ID laws to favor Republican electoral prospects and disadvantage Democrats. It is therefore no surprise that voter ID laws were enacted predominantly by state governments under Republican Party control and legislatively approved through party-line votes. For instance, from 2005 to 2007, 95.3 percent of 1,222 Republican legislators who voted on state voter ID bills, all introduced by fellow Republicans, voted to approve them.<sup>298</sup> Just 2.1 percent of 796 Democratic legislators voted likewise.<sup>299</sup> Every state that has enacted a strict requirement of a photo ID to vote has done so under unified Republican legislative control, and in almost

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295. See, e.g., Richard L. Hasen, *Keynote Address of Prof. Richard L. Hasen Given to The Voting Wars Symposium, March 23, 2013*, 28 J.L. & POL. 417, 429–30 (2013); LaVigne, *supra* note 294.

296. See Hasen, *supra* note 295, at 430.

297. E.g., Matthew A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS 111, 113–15 (2009); M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 36 AM. POL. RES. 555 (2008). Some instead contend that Democrats will be hurt by voter ID laws only because ID requirements deter voter fraud, and they claim that Democrats cheat more. See, e.g., Edwin Meese III & J. Kenneth Blackwell, *Holder's Legacy of Racial Politics*, WALL STREET J., Sept. 29, 2014, at A19, <https://www.wsj.com/articles/ed-meese-and-j-kenneth-blackwell-holders-legacy-of-racial-politics-1411945138> (on file with the *Michigan Law Review*) (claiming Democrats encourage voter impersonation); Michael Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/some-republicans-acknowledge-leveraging-voter-id-laws-for-political-gain.html> (on file with the *Michigan Law Review*) (citing statements by Republican Representative Glenn Grothman).

298. Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L.J. 85, 86 (2009).

299. *Id.*

every case under Republican gubernatorial control as well.<sup>300</sup> One study estimates that the likelihood of a new photo ID law is sixteen times greater under unified Republican control of state government than any other partisan composition.<sup>301</sup> Another study focused on the timing of voter ID laws' passage finds the partisan takeover of the legislature and governorship in a state is the best predictor of passage for all categories of voter ID laws and concludes that "the story behind the adoption of a variety of different voter ID laws is primarily a partisan one."<sup>302</sup>

Republican politicians, staffers, and operatives were surprisingly willing to publicly admit their expectations that their voter ID laws would help their party's electoral prospects. It was not only prominent Republicans like Paul Weyrich who acknowledged partisan self-interest in suppressing turnout as overarching political strategy.<sup>303</sup> Admissions abounded among Republicans betraying the partisan motivations specifically behind passage of voter ID laws and other cutbacks on voting.<sup>304</sup> In one of the most publicized examples, Pennsylvania House Republican leader Mike Turzai boasted that the state's new voter ID law was "gonna allow [Republican presidential nominee Mitt] Romney to win the state of Pennsylvania, done."<sup>305</sup> A local Republican official in North Carolina similarly told the *Daily Show* that his state's new voter ID law was "going to kick the Democrats in the butt."<sup>306</sup> Given these expectations about the partisan payoff from voter ID laws, it might not be surprising that, according to a former Republican legislative staffer, Wisconsin state legislators deliberating over new voter ID laws in the Republican caucus "were giddy about the ramifications and literally singled out the prospects of suppressing minority and college voters."<sup>307</sup> Giving away the worst-kept secret in American politics, Republican consultant Scott Tranter

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300. Biggers & Hanmer, *supra* note 280, at 580 (reporting that the twelve states with the most stringent ID requirement of a photo ID were under Republican legislative control, and all but one under a Republican governor as well).

301. Rene R. Rocha & Tetsuya Matsubayashi, *The Politics of Race and Voter ID Laws in the State: The Return of Jim Crow?*, 67 POL. RES. Q. 666, 671 (2014); see also William D. Hicks et al., *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RES. Q. 18 (2015) (finding the strength of Republican legislative control positively and significantly increases likelihood of adopting photo ID requirements, except in electorally noncompetitive states).

302. Biggers & Hanmer, *supra* note 280, at 580.

303. Hicks et al., *supra* note 301, at 19.

304. E.g., Aaron Blake, *Republicans Keep Admitting that Voter ID Helps Them Win, for Some Reason*, WASH. POST (Apr. 7, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win/> [https://perma.cc/M77J-G6GG] (collecting examples); David A. Graham, *What's the Goal of Voter-ID Laws?*, ATLANTIC (May 2, 2016), <https://www.theatlantic.com/politics/archive/2016/05/jim-demint-voter-id-laws/480876/> [https://perma.cc/WS8B-6F5B] (same); Wines, *supra* note 297.

305. Mackenzie Weinger, *Pa. Pol: Voter ID Helps GOP Win State*, POLITICO (June 25, 2012, 4:26 PM), <http://www.politico.com/story/2012/06/pa-pol-voter-id-helps-gop-win-state-077811> [https://perma.cc/XG4P-XHLW] (quoting Turzai).

306. Blake, *supra* note 304 (quoting Don Yelton, then GOP county precinct chair).

307. Wines, *supra* note 297 (quoting Allbaugh).

admitted that “we want to do everything we can to help our side. Sometimes we think that’s voter ID, sometimes we think that’s longer lines.”<sup>308</sup>

An obstacle to judicial intervention, though, is that constitutional challenges to voting restrictions have traditionally been framed in racial, not partisan terms. The wealth of equal protection jurisprudence on voting focused on the problem of racial discrimination, often under the Voting Rights Act, to the neglect of increasingly related questions of partisan discrimination.<sup>309</sup> Just so, courts drew on well-established constitutional methodology in assessing voter ID laws under the Voting Rights Act when challenges were framed as problems of racial discrimination against African American and Latino voters.<sup>310</sup> Courts, at least initially, balked at challenges to voter ID laws that seemed framed as questions of partisan discrimination because no established methodology could readily be pulled off the shelf for the purpose.<sup>311</sup> Voter ID requirements were not discriminatory on their face against Democrats and applied neutrally to all voters, regardless of their disproportionate impact in practical application.<sup>312</sup> Nor were Democrats a protected class for equal protection purposes. Courts had not yet recognized a broad claim of partisan discrimination, in part because earlier voting restrictions targeted racial minorities rather than partisan ones. Although both parties had always fixed voting rules to their advantage to a degree, the recent generation of voting restrictions since *Bush v. Gore* signaled a new era of intense partisanship and overweening deployment of election administration for partisan ends to which constitutional law had not yet adapted.<sup>313</sup>

By 2012, courts could no longer ignore glaring partisanship in violation of the usual constitutional expectation of government nondiscrimination, even in the absence of a readily available doctrinal cubbyhole. Judge Richard Posner’s abrupt pivot on voter ID laws exemplified this changed approach. Judge Posner authored the circuit court affirmance upholding Indiana’s

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308. John Stephens, *Scott Tranter, Republican Consultant: Voter ID and Long Lines Help Our Side*, HUFFINGTON POST (Dec. 10, 2012, 8:29 PM), [http://www.huffingtonpost.com/2012/12/10/republican-voter-id-scott-tranter\\_n\\_2273927.html](http://www.huffingtonpost.com/2012/12/10/republican-voter-id-scott-tranter_n_2273927.html) [<https://perma.cc/9SG6-T2T9>].

309. See Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1210–12 (2007).

310. E.g., *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 612 (2017).

311. See, e.g., *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006) (finding that plaintiffs challenging Indiana’s voter ID law were extending a “partisan legislative disagreement that has spilled out of the state house into the courts” but had “failed to adapt their arguments to the legal arena”), *aff’d sub nom. Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008).

312. See, e.g., *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 WL 184988, at \*25 (Pa. Commw. Ct. Jan. 17, 2014) (explaining that a voter ID law “is facially neutral” because “[o]f those who lack compliant photo ID, the statute applies to them all equally”).

313. See generally RICHARD HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012) (surveying this shift); Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363 (2015) (describing the pivot from race to partisanship).



voter ID law in *Crawford*.<sup>314</sup> His succinct opinion acknowledged that the photo ID requirement was more likely to affect Democratic voters but dismissed as minor any burden it imposes.<sup>315</sup> Because the burden is minor, and no suspect class implicated, the ID law needed only to satisfy rational basis review, for which the deference to the state is overwhelming. Rational basis did not require any deeper probe into the state's putative purpose of preventing voter fraud. However, with the spread of voter ID laws across Republican states, Judge Posner grew skeptical of voter ID laws and credited the prescience of the dissenting claim in *Crawford* that the voter ID law there was "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."<sup>316</sup> Assessing the Wisconsin voter ID law in *Frank v. Walker*, Judge Posner was now convinced of the partisan purpose behind such laws and therefore unwilling to defer to the state.<sup>317</sup> The pattern of Republican adoption of voter ID laws coupled with the fact that "voter-impersonation fraud is extremely rare" undercut state claims that these requirements had anything but the partisan purpose of impeding Democratic turnout.<sup>318</sup>

Posner's reversal on voter ID laws signaled a larger, subtle judicial shift on the issue. States had initially defeated nearly every challenge to voter ID laws, particularly in the wake of *Crawford*.<sup>319</sup> The tide, however, began to shift as the partisanship behind these laws became undeniably apparent over time. Some of these challenges occurred under the Voting Rights Act as racial discrimination claims where plaintiffs had stronger basis for claiming judicial protection from state antagonism.<sup>320</sup> But even non-race-based claims began to receive surprising judicial sympathy as courts struck down or limited voter ID laws where the usual application of rational basis review

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314. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

315. *Id.* at 951–52.

316. *Frank v. Walker*, 773 F.3d 783, 784 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc) (quoting *Crawford*, 472 F.3d at 954 (Evans, J., dissenting)).

317. *Id.* at 789–95. The district court below found "because virtually no voter impersonation occurs in Wisconsin and it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future, this particular state interest has very little weight." *Frank v. Walker*, 17 F. Supp. 3d 837, 847 (E.D. Wis.), *rev'd*, 768 F.3d 744.

318. *Frank*, 773 F.3d at 791.

319. See, e.g., *Gonzales v. Arizona*, 677 F.3d 383, 388, 410 (9th Cir. 2012); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009); *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1011 (6th Cir. 2006); *Perdue v. Lake*, 647 S.E.2d 6, 7–8 (Ga. 2007); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 768–69 (Ind. 2010); *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 447–48 (Mich. 2007).

320. See, e.g., *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 594 (4th Cir. 2016); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017); *Veasey v. Abbott*, 830 F.3d 216, 227 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017); *Brakebill v. Jaeger*, Case No. 1:16-CV-008, 2016 WL 7118548, at \*2–3 (D.N.D. Aug. 1, 2016); *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012); *Texas v. Holder*, 888 F. Supp. 2d 113, 117 (D.D.C. 2012), *vacated mem.*, 133 S. Ct. 2886 (2013).

seemed to require deference to the state. In addition to several decisions limiting voter ID laws under the Voting Rights Act in South Carolina<sup>321</sup> and Texas,<sup>322</sup> courts in Arkansas,<sup>323</sup> North Dakota,<sup>324</sup> Pennsylvania,<sup>325</sup> and Tennessee<sup>326</sup> either struck down or modified state voter ID laws to minimize their burden on voters. In other words, as Rick Hasen concludes, “it appeared that in the most egregious cases of partisan overreach, courts were serving, often with surprising unanimity, as a judicial backstop.”<sup>327</sup> Judicial decisions were far from uniformly sympathetic to these constitutional challenges, but even in the absence of obvious doctrinal direction, courts appeared surprisingly willing to limit intended partisan payoffs, particularly when states imposed new restrictions in a rush before the 2012 elections.

Courts acted along similar lines to limit state cutbacks on early voting. Again, Republicans believed that restricting in-person early voting would limit Democratic turnout and help their electoral chances. For instance, top Florida Republicans, including former Republican governor Charlie Crist and former Republican Party chairman Jim Greer, among others, admitted that reductions to the early voting period in the state were motivated by partisan self-interest, rather than the claimed prevention of voter fraud.<sup>328</sup> As Greer put it, the antifraud rationale for these cutbacks was a thin pretext, “all a marketing ploy,” because the Republican legislature cut back early voting “for one reason and one reason only”—“early voting is bad for Republican Party candidates.”<sup>329</sup> Although evidence of voter fraud from early voting was just as vacuous as evidence of voter impersonation, Republican governments curtailed early voting and restricted voting through other administrative means in several battleground states leading up to the 2012 elections, including Florida and Ohio.

One particular 2012 Ohio case, decided just weeks before that year’s presidential election, illustrated how courts began responding to the obvious partisanship of this sort of election lawmaking. *Obama for America v. Husted* addressed a constitutional challenge to cutbacks on early voting in Ohio in

321. *South Carolina*, 898 F. Supp. 2d at 53–54 (Bates, J., concurring).

322. *See supra* note 320.

323. *Martin v. Kohls*, 444 S.W.3d 844, 852–53 (Ark. 2014).

324. *Brakebill*, 2016 WL 7118548, at \*2–3.

325. *Applewhite v. Commonwealth*, 54 A.3d 1, 3–5 (Pa. 2012) (per curiam); *see also* *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 WL 184988, at \*60 (Pa. Commw. Ct. Jan. 27, 2014).

326. *City of Memphis v. Hargett*, No. M2012–02141–COA–R3–CV, 2012 WL 5265006, at \*1 (Tenn. Ct. App. Oct. 25, 2012).

327. Hasen, *supra* note 18, at 1868.

328. Dara Kam, *Former Florida GOP Leaders Say Voter Suppression Was Reason They Pushed New Election Law*, PALM BEACH POST (Nov. 25, 2012), <http://www.palmbeachpost.com/news/state--regional-govt--politics/former-florida-gop-leaders-say-voter-suppression-was-reason-they-pushed-new-election-law/R9iQlcYqCBY3k1u4k5XdLP/> [https://perma.cc/C6LQ-LEDS].

329. *Id.* (quoting Greer).

advance of the 2012 elections.<sup>330</sup> For six years until these cutbacks, all Ohio voters could vote early in person during the three days immediately before election day.<sup>331</sup> An estimated 93,000 Ohioans had voted early during these three days in the previous presidential election, and these voters tended to vote Democratic, boosted by the “souls to the polls” mobilization of African American churchgoers on Sunday.<sup>332</sup> Not coincidentally, leading up to the 2012 elections, the Republican legislature hurried through legislative changes that abolished early voting during the critical final weekend for 2012.<sup>333</sup> Furthermore, these enactments ended early voting for most Ohioans, but the legislature left open early voting during these three days only for military voters, who voted disproportionately Republican.<sup>334</sup> This reduction in early voting for voters who favored Democrats, while exempting voters who favored Republicans, resulted from what Ned Foley called a “convoluted series of legislative enactments”<sup>335</sup> with minimal legislative deliberation or government rationale beyond rote recitations about administrative burdens and cost saving.<sup>336</sup>

The problem for any constitutional challenge here was the absence of an underlying right to early voting in the first place. The state of Ohio was under no constitutional obligation to offer early voting at all, let alone specifically during the three days preceding the election. In fact, Ohio still allowed twenty-three days of early voting, more than the average among thirty-two states that permitted early voting at all.<sup>337</sup> The lawsuit was therefore a “Hail Mary” pass for Democrats bringing the challenge and the subject of a famous wager among Democratic campaign lawyers as a longshot proposition.<sup>338</sup> The constitutional problem in *Husted* was not the early voting reduction by itself, but instead the government’s differential treatment of Democratic- and Republican-leaning voters in the absence of serious government justification, particularly in the run-up to a presidential election.<sup>339</sup>

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330. 888 F. Supp. 2d 897, 902 (S.D. Ohio), *aff’d*, 697 F.3d 423 (6th Cir. 2012).

331. *Obama for Am.*, 888 F. Supp. 2d at 902.

332. *See id.* at 902–03; *see also* Hasen, *supra* note 18, at 1879–80.

333. *See* Steven F. Heufner, *Lessons from Improvements in Military and Overseas Voting*, 47 U. RICH. L. REV. 833, 858–62 (2013).

334. *See* Michael J. Pitts, *Defining “Partisan” Law Enforcement*, 18 STAN. L. & POL’Y REV. 324, 337 (2007) (explaining that expansion of military voting helps Republicans).

335. Edward B. Foley, *Non-Retrogression, Equal Protection, and Ohio’s Early Voting Case*, ELECTIONLAW@MORITZ (Sept. 6, 2012, 10:59 AM), <http://moritzlaw.osu.edu/election-law/article/?article=9673> [<https://perma.cc/5UKA-FMC5>].

336. *See id.*; *see also* *Obama for Am. v. Husted*, 697 F.3d 423, 432–33 (6th Cir. 2012) (noting “the financial hardship that early voting might cause” to the state and the counties); *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 548 (6th Cir. 2014) (noting that, in *Obama for America*, the state asserted an “interest in reducing costs and administrative burdens”), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

337. *See* Hasen, *supra* note 18, at 1868.

338. *See id.* at 1879–81.

339. *Cf. Obama for Am.*, 697 F.3d at 435 (“[T]he State has offered no justification for not providing similarly situated voters those same opportunities.”).

The district court surprisingly enjoined the cutback and explained that its basis was not a broader right to early voting but instead a determination against arbitrary discrimination among voters.<sup>340</sup> In a further upset, the Sixth Circuit affirmed the district court and cautioned against the risks “if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges.”<sup>341</sup> Indeed, describing the present case without being so explicit, the court warned that without a judicial check, “[p]artisan state legislatures could give extra early voting time to groups that traditionally support the party in power and impose corresponding burdens on the other party’s core constituents.”<sup>342</sup> For this reason, the court insisted on greater scrutiny than usually applied under rational basis to the asserted injury and the precise interests proffered by the state.<sup>343</sup>

The best way to understand *Husted* and other cases similarly limiting partisan overreach is enforcement of a basic, implicit constitutional norm against government partisanship. Even in the absence of firm doctrinal direction, courts instinctively reacted to the wrongfulness of incumbents serving, in these cases, the undeniably partisan purpose of entrenching themselves.<sup>344</sup> It is important not to overclaim and still acknowledge that courts have not invented wholesale new prohibitions on election rules that differentially impact partisans. In a familiar analysis described earlier, the mere presence of partisan motivations would not per se invalidate laws with partisan results provided the laws could be justified by coinciding legitimate government interests.<sup>345</sup> As a result, judicial intervention in these cases has been uneven and sometimes overturned later on. Still, one remarkable consistency is that partisanship standing alone, with other potential government interests stripped away as inapplicable, cannot qualify as an adequate constitutional basis for upholding such laws even under rational basis, especially the heightened rational basis applied by the Sixth Circuit. The transparent weakness of the claimed antifraud justifications for voter ID laws and the claimed cost savings from early voting reductions laid bare the raw partisanship motivating these laws. Cases like *Husted* demonstrate judicial willingness to enforce an overarching constitutional norm of government nonpartisanship, even in the absence of clear textual basis, when confronted with patently partisan attempts to jury-rig election results.

340. *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 910 (S.D. Ohio), *aff’d*, 697 F.3d 423.

341. *Obama for Am.*, 697 F.3d at 435.

342. *Id.*

343. *Id.* at 431.

344. See Issacharoff, *supra* note 17, at 311 (explaining that the Ohio early voting cutbacks “smacked of misuse of state authority to attempt to alter election outcomes”); see also Janai S. Nelson, *The First Amendment, Equal Protection and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111 (2013) (analyzing felon disenfranchisement in similar terms); Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763 (2016) (characterizing new voting restrictions in partisan terms and arguing for judicial attention to the partisan impact of such laws).

345. See, e.g., *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016) (upholding cutbacks in early voting without differentiation between military and civilian voters).

For this principle, the *Husted* courts cited back to *Bush v. Gore*.<sup>346</sup> If *Bush v. Gore* stands for anything, it prohibits differential standards for recounting ballots based on a fear that government actors might tailor ad hoc standards to advance their party's candidates. The Court in *Bush v. Gore* was careful to cabin this principle to the very specific context of "a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards."<sup>347</sup> The Court did not want to impose a constitutional requirement of uniform election procedures across localities as a general matter. Still, it saw special need for uniformity in a post-election recount where election administrators could purposefully swing the close election's outcome by choosing counting standards more favorable to their preferred candidate. In other words, *Bush v. Gore* identified and enforced a similar constitutional expectation, as the *Husted* court explained, that "the State may not by later arbitrary and disparate treatment, value one person's vote over that of another."<sup>348</sup>

In an important sense, Justice Stevens's opinion in *Crawford* anticipated this principle. Although Justice Stevens voted in *Crawford* to uphold Indiana's voter ID law, he also held open the opportunity for as-applied challenges and addressed the problem of partisan motivations. The plaintiffs had pointed out that the state had passed its voter ID law on a party-line vote, and even Justice Stevens agreed that "partisan considerations may have played a significant role."<sup>349</sup> But this was early in the wave of voter ID laws to come, and Justice Stevens could not rule out the legitimacy of antifraud interests in justifying the law as confidently as later courts.<sup>350</sup> In a mixed motive case where "a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators."<sup>351</sup> Justice Stevens noted cautiously that "[i]f such [partisan] considerations had provided the only justification for a photo identification requirement, we may also assume that SEA 483 would suffer the same fate as the poll tax at issue in *Harper*."<sup>352</sup> That is, the presence of partisanship in the legislative motivation was not grounds by itself for invalidation, but partisan considerations could not serve as the state purpose and justification for the law either.

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346. See *Obama for Am.*, 697 F.3d at 428 (citing *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam)); *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 905, 907, 910 (S.D. Ohio) (citing *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam)), *aff'd*, 697 F.3d 423.

347. *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam).

348. *Obama for Am.*, 888 F. Supp. 2d at 910 (emphasis omitted) (quoting *Bush*, 531 U.S. at 104–05).

349. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) (plurality opinion).

350. See, e.g., *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 WL 184988, at \*20 (Pa. Commw. Ct. Jan. 17, 2014) (finding the state "wholly failed to show any evidence of in-person voter fraud" and refusing to find "in-person voter fraud a compelling interest the Voter ID Law was designed to serve").

351. *Crawford*, 553 U.S. at 204.

352. *Id.* at 203.

## III. THE CONSTITUTIONAL NORM AGAINST PARTISAN GERRYMANDERING

The norm against government partisanship is more the rule than the exception across the law of democracy. Official nondiscrimination follows naturally from the overarching premises of the First Amendment, equal protection, and democratic government. The puzzle therefore is why the Court in *Vieth* diverged from this natural expectation of nonpartisanship in the judicial oversight of legislative redistricting where the need for government nonpartisanship is most acute and so rarely met.<sup>353</sup> Courts and commentators have been convinced by Justice Scalia's declarations<sup>354</sup> that partisanship "is a traditional criterion, and a constitutional one" in redistricting provided it does not "go too far."<sup>355</sup> This faith, widely accepted after *Vieth*, clashes with so many elements of constitutional law that courts have since struggled to coherently patch together a consistent approach to government partisanship at a time when hyperpolarized partisanship threatens the law of democracy more saliently than at any point during our lifetime. Explicit consolidation of this approach under a constitutional rule against government partisan purpose would bring new coherence to the judicial approach to partisan gerrymandering and spill off similar benefits across election law at a time it is most urgently needed.

A. *A Way Forward Against Partisan Gerrymandering*

In reconsidering partisan gerrymandering, the Court should clearly assert the norm against government partisanship described here from First Amendment law, to one person, one vote, to election administration. In all the areas of law described above, the crux of the harm is the government's partisan purpose, not the magnitude of partisan effect.<sup>356</sup> The problem with a government advertisement endorsing one party over the other is not simply that the government endorsement will be effective in swinging an election. An advertisement's effectiveness is almost totally irrelevant to the constitutional question of viewpoint discrimination. The core harm is the government's clear partisan purpose to bias the election, whether or not the attempt is effective. For the same reason, courts striking down partisan gerrymanders for violating one person, one vote focus on the partisanship of the government's purpose and legislative process. They do not measure the harm in those cases by the magnitude of the partisan effect, or even the magnitude of the population deviation.

Just so for redistricting, there is no obvious sense in permitting a non-trivial measure of partisan favoritism or animus as the basis for lawmaking,

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353. Cf. *Harris v. McCrory*, 159 F. Supp. 3d 600, 629 (M.D.N.C. 2016) (Cogburn, J., concurring) ("While redistricting to protect the party that controls the state legislature is constitutionally permitted and lawful, it is in disharmony with fundamental values upon which this country was founded."), *aff'd sub nom.* *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

354. See *supra* Section I.A.

355. *Cox v. Larios*, 524 U.S. 947, 952 (2004) (Scalia, J., dissenting).

356. See *supra* Part II.

as Justice Scalia would have it, but drawing the constitutional line at some further extreme amount. Any difference is only in degree, not in kind, at least as far as the Court has been able to articulate. And the degree of harm from significant gerrymanders, like those still upheld in *Bandemer* and *Vieth*,<sup>357</sup> are paradigmatic examples of partisan gerrymandering that no one denies are obvious attempts by the government to extend majority party advantage. More extreme examples of gerrymandering are hard to imagine, as the case law following *Bandemer* documents.<sup>358</sup> So, if any partisan gerrymander is unconstitutional, it must be these classic instances of the species.

Understanding that the core harm from partisan gerrymandering is this violation of government nonpartisanship illuminates the best approach for courts to identifying unconstitutionality in this context. First, the constitutionality of a redistricting depends not necessarily on extreme partisan asymmetry in terms of political results but on the exclusivity of the government's partisan purpose underlying the redistricting. Courts already investigate partisan purpose under virtually every approach to partisan gerrymandering, so this type of judicial inquiry into partisan purpose is already well established and far from new.<sup>359</sup> What is newly proposed here is that the constitutionality of a redistricting no longer hinge upon the extremeness of its practical effects. A more extreme partisan gerrymander is not more unconstitutional than a less extreme one because it goes further, or even because it goes too far at all. Instead, the degree to which the government acts to serve wholly partisan purposes rather than legitimate state interests in redistricting, determines the constitutional wrongfulness in violation of the usual norm. Partisan purpose can be established through direct evidence or through indirect demonstration that the redistricting's partisan effect cannot be explained except with reference to purpose to advantage the majority party over others.

The precise articulation of the judicial analysis for identifying the requisite partisan purpose is less important than this basic substantive re-orientation of the inquiry. However, in considering a "second-order" challenge to partisan redistricting under one person, one vote, the Supreme Court reasoned that the plaintiffs needed to show that "it was more probable than not that the use of illegitimate factors significantly explained deviations from numerical equality."<sup>360</sup> Courts could readily adapt this articulation from "second-order" review of partisan gerrymandering under one person, one vote, to first-order review of partisan gerrymandering by requiring plaintiffs

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357. *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (plurality opinion); *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (plurality opinion).

358. See *supra* Part I.

359. See Fallon, *supra* note 13, at 534; *supra* note 14 and accompanying text; see also Brief of the ACLU et al. as Amicus Curiae, in Support of Appellees at 28–31, *Gill v. Whitford*, No. 16-1161 (U.S. Sept. 1, 2017) (proposing a burden-shifting approach to partisan intent based on the pattern-or-practice cases under civil rights laws).

360. *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016).

to show it more probable than not that partisan purpose significantly explains a redistricting's partisan characteristics to the exclusion of legitimate state interests under rational basis. Doing so would unify both equal protection approaches to gerrymandering under the same standard and reasoning. The exclusivity of the government's partisan purposes, not the extremeness of partisan bias in election outcomes, would be the critical consideration. Courts evaluating partisan gerrymandering under a parallel state provision of equal protection, or alternatively the right to vote or the First Amendment, could conceivably adopt a similar approach and standard.

Viewed in this light, *LULAC v. Perry*<sup>361</sup> was an underestimated moment in the law of gerrymandering. Although it is easy to remember *LULAC* as a simple reaffirmation of *Vieth*, *LULAC* presented a clearer case of essential partisan purpose than *Vieth*. *LULAC* featured a mid-decade redistricting, a rare re-redistricting, where the state of Texas had no constitutional obligation under one person, one vote to redistrict, and the district court had found "little question but that the single-minded purpose of the Texas Legislature . . . was to gain partisan advantage."<sup>362</sup> The circumstances of the re-redistricting made unusually clear the government's partisanship, bolstered by testimony from state legislators and procedural irregularities aimed at ramming the re-redistricting through the legislature.<sup>363</sup> In other words, *LULAC* offered the Court particularly powerful direct evidence of the government's partisan purpose, as Justices Stevens and Breyer emphasized in their opinions. In nonetheless dismissing the constitutional challenge, Justice Kennedy's majority opinion in *LULAC* did not quite discount the centrality of partisan purpose, but insisted that "partisan aims did not guide every line [the legislature] drew," and returned to the question of a judicial standard for measuring the representational harm.<sup>364</sup> *LULAC*, with exceptional direct evidence of partisanship, was thus a lost opportunity to focus courts on partisan purpose and square redistricting with the rest of constitutional law.

Second, courts should focus on the extremeness of a redistricting's partisan effects primarily as a proxy for partisan purpose, rather than a measure of the substantive harm itself. Again, there is no magical threshold for partisan bias from gerrymandering above which it presents a substantive harm, but below which it does not. It is hard even to imagine a theory under which only extreme partisan bias is constitutionally wrongful, but a lesser and still significant amount is not. Cases like *LULAC* with overwhelming direct evidence of partisan purpose therefore do not require significant inquiry into the extremeness of the redistricting's partisan effects. In these cases, the requisite partisan purpose of the state is manifest from the peculiarities of the

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361. 548 U.S. 399 (2006).

362. *LULAC*, 548 U.S. at 417 (opinion of Kennedy, J.) (quoting *Session v. Perry*, 298 F. Supp. 2d 451, 470 (E.D. Tex.), *vacated sub nom. Jackson v. Perry*, 543 U.S. 941 (2004)); see also *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231–32 (Colo. 2003) (striking down a congressional re-redistricting under state law as against public policy).

363. *LULAC*, 548 U.S. at 458 (Stevens, J., concurring in part and dissenting in part).

364. *Id.* at 417 (opinion of Kennedy, J.).



legislative process and testimony from those involved in it. With partisan purpose established, there is no need to assess the extremeness of partisan effects because it serves merely as an indirect method for establishing purpose where direct evidence is less clear.

The magnitude of partisan bias resulting from a gerrymander is therefore only a prudential consideration. Courts ought to measure the extremeness of partisan bias when direct evidence is less than overwhelming, because it serves as indirect but reliable evidence of the real constitutional focus, the government's overriding partisan purpose. In cases where purpose is less clear, expert testimony regarding the expected partisan bias of the plan can show that the bias is so extreme that it is overwhelmingly likely the result of purposeful government efforts to prioritize partisan advantage over other legitimate state interests. An example from the one person, one vote cases is the Fourth Circuit case *Raleigh Wake Citizens Ass'n v. Wake County Board of Elections*.<sup>365</sup> An expert political scientist's study of the redistricting there led him to testify "with extremely high statistical certainty, beyond any sort of doubt," given the partisan bias of the redistricting, that it was the product of partisanship.<sup>366</sup> The Fourth Circuit clarified that the study was not legally required as a means of establishing a requisite level of extremeness, but instead that it helped "demonstrate what might explain the population deviations in the enacted plan" and thus expose alternate state explanations as pretextual.<sup>367</sup> The magnitude of partisan bias evidences partisan purpose because it becomes impossible for the government to explain the redistricting in terms of legitimate state interests, as opposed to raw partisanship, when the partisan bias is so extreme.

As a consequence, any judicial standard for measuring the partisan effects of a gerrymander should be directed toward demonstrating the government's essential partisan purpose. Proposed measures of partisan effects should be understood as ways of evidencing how the redistricting is the result of purpose to advantage the majority party to the exclusion of other redistricting criteria. For instance, Ned Foley argues that representational distortion from a challenged gerrymander ought to be compared to the same measure for the original gerrymander of an 1812 Massachusetts legislative district, named after Elbridge Gerry.<sup>368</sup> Using the standard of the original gerrymander as a measuring stick for the constitutional violation makes sense, Foley argues, because the original gerrymander embodies the archetypal violation of fair play for which the practice of gerrymandering is now known.<sup>369</sup> But Foley assumes that the substantive problem with a gerrymander is the representational distortion itself, which is constitutionally cognizable only beyond a certain objective threshold just as Justice Scalia argues.

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365. 827 F.3d 333 (4th Cir. 2016).

366. *Raleigh Wake Citizens Ass'n*, 827 F.3d at 344.

367. *Id.*

368. Foley, *supra* note 95, at 711, 720–21.

369. *Id.* at 720–21.

Although the representational distortion may track important representational harms flowing from the gerrymander, the crux of the constitutional inquiry instead ought to remain focused on the centrality of the government's partisan purpose. A measure of extreme representational distortion is probative by indirectly showing, in combination with available direct evidence, that extreme bias did not occur incidentally from the government's pursuit of legitimate redistricting criteria. It was instead a purposeful result entirely of government's effort to expand its partisan advantage.

This approach obviates the need to establish an objective baseline for measuring representational harm. To judge when a gerrymander goes "too far" in terms of partisan bias, the argument has always been that one needs an objective expectation of fair representation to measure the representation harm as distortion from this baseline expectation. This conundrum of political theory was Justice Scalia's bone of contention in *Vieth*, and the source of Justice Kennedy's inaction in *Vieth* and *LULAC*. But if legitimate state interest and partisan purpose are the focus, then precise measurement of representational harm is no longer central to the claim. Instead, the inquiry shifts to which government purposes are responsible for whatever partisan bias stands in question, large or small. If direct evidence substantiates government partisanship as the answer, then the partisan gerrymander may be unconstitutional even if the magnitude of partisan bias is not extreme. Conversely, if the government can explain the resulting partisan bias as a byproduct of legitimate, nondiscriminatory state interests in redistricting, such as district compactness, compliance with one person, one vote, or respect for political subdivisions, then the government may successfully defend the gerrymander. For instance, political scientists Jowei Chen and Jonathan Rodden's use of computer simulations estimate the likelihood that a redistricting's partisan bias is the result simply of geographic contiguity, compactness, and population equality without reference to party and race.<sup>370</sup> Bruce Cain, Emily Zhang, Yan Liu, and Wendy Tam Cho offer a more robust supercomputing solution that can demonstrate the ease of drawing a compliant plan without similar levels of partisan bias.<sup>371</sup> When combined with other evidence, their results offer a rough baseline for judging whether a redistricting's actual bias could have resulted only from the additional purpose of advancing the majority party's interests.<sup>372</sup>

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370. Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 *ELECTION L.J.* 331 (2015); Chen & Rodden, *supra* note 37.

371. Bruce E. Cain et al., *A Reasonable Bias Approach to Gerrymandering: Using Automated Plan Generation to Evaluate Redistricting Proposals*, 59 *WM. & MARY L. REV.* (forthcoming Apr. 2018) (on file with the *Michigan Law Review*); see also Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 *STAN. L. REV.* 1263 (2016).

372. Such results, of course, offer only a rough baseline unless the simulations also incorporate applicable state and federal legal requirements, including the Voting Rights Act, in addition to contiguity, compactness, and equipopulosity. See Wang, *supra* note 371, at 1306–16.

One potential criticism is that this approach to partisan gerrymandering does not go far enough. For instance, this approach allows for the possibility of a partisan gerrymander with objectively large partisan bias that is not constitutionally actionable if the government can persuasively answer that partisan bias occurred coincidentally in the government's pursuit of other legitimate political interests. As Justice Breyer explained in *Vieth*, "The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends."<sup>373</sup> None of the justices, including Justice Stevens, had any interest in excising all trace of partisanship from the redistricting process where the results can be plausibly understood as directed toward some legitimate, public-spirited ends.<sup>374</sup> The worry was less about removing all underlying partisan motivation and effect from the process than permitting it only when incidental to the state's pursuit of legitimate political objectives through the process. The constitutional requirement is not a politically fair division of partisan representation.<sup>375</sup> The requirement is simply that the government have "an acceptable rational basis [that is] neither purely personal nor purely partisan."<sup>376</sup> This requirement thus indirectly serves as a prudential limitation on judicial intervention. If most gerrymanders are not so severe, nor so motivated by partisanship, that other interests significantly account for their resulting partisan bias, then only the most severe and clearest cases of partisan gerrymandering will be found unconstitutional.<sup>377</sup>

However, the requirement of legitimate purpose beyond partisanship still substantively restrains the excesses of gerrymandering because pretextual justifications go only so far. Justice Scalia overstates the case when he argues that "there *always* is a neutral explanation" for a gerrymander.<sup>378</sup> Courts already scrutinize government justifications for redistricting decisions according to established methodology honed by years of judicial practice. For example, in *Larios v. Cox*, the district court closely examined and rejected the state's claims that its gerrymander was justified by its interests in

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373. *Vieth v. Jubelirer*, 541 U.S. 267, 360 (2004) (Breyer, J., dissenting).

374. *See, e.g., id.* at 335 (Stevens, J., dissenting).

375. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 130 (1986) ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.").

376. *Vieth*, 541 U.S. at 337–38 (Stevens, J., dissenting).

377. Chris Elmendorf astutely observes that an intent-based focus may shift unmanageability from an inquiry into effects to one about intent. *See* Christopher Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders*, 59 WM. & MARY L. REV. (forthcoming Apr. 2018) (on file with the *Michigan Law Review*). An intent-based focus, however, places conceptual focus in the right place, on government partisanship, which is a valuable move. Elmendorf himself offers a framework for identifying relevant state interests and measuring them against a redistricting plan that would be helpful in an intent-based inquiry and mitigate any unmanageability. *Id.*

378. *Vieth*, 541 U.S. at 300 (plurality opinion).

incumbent protection and preserving existing districts.<sup>379</sup> The court observed that the state had pursued these interests inconsistently, to the exclusive advantage of only one party, and therefore dismissed the state justifications as pretextual.<sup>380</sup> Likewise in *Whitford*, the district court considered whether the gerrymander there could “be justified by the legitimate state concerns and neutral factors that traditionally bear on the reapportionment process.”<sup>381</sup> The court dismissed the state’s claims that the gerrymander could be justified in terms of legitimate state interests, as well as Wisconsin’s political geography, because the plaintiffs demonstrated no shortage of alternative maps that served those interests equally well without comparable partisan bias.<sup>382</sup> Indeed, the plaintiffs showed that the state itself considered many alternative maps that did the same with less partisan bias, but deliberately rejected them because, as the district court saw it, the state’s purpose was precisely to exaggerate the partisan advantage, its contrary claims notwithstanding.<sup>383</sup>

Of course, state actors would obscure their partisanship to minimize direct evidence of impermissible purpose. If and when they do so successfully, partisan gerrymandering cases will again return largely to an analysis of partisan effects. Why is this approach still better even then? If courts focus on partisan effects in the absence of direct evidence, courts will know clearly why they are doing so and what they need to find for the plaintiffs to win—partisan purpose to the exclusion of other legitimate government interests as justification. And there is no need at all to engage the intractable inquiry into the normative baseline of what constitutes fair representation from which to measure representational harm. This question has bedeviled courts and commentators since *Vieth*, and it becomes a moot point when courts focus on partisan purpose, not representational harm.

An alternate criticism is that a purpose-centered approach actually goes too far by requiring courts to engage in the quagmire of discerning legislative purpose. After all, the *Shaw v. Reno* cases demonstrated the challenges of sorting out the complex legislative politics intrinsic to redistricting.<sup>384</sup> But there are at least two important responses. First, courts already inquire into legislative intent and purpose under current redistricting law. *Bandemer* required plaintiffs to show “intentional discrimination against an identifiable

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379. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1347–51 (N.D. Ga.), *aff’d mem.*, 542 U.S. 947 (2004). For a recent example of successful, albeit partial, defense by the government, see *Perez v. Abbott*, SA–11–CV–360, 2017 WL 1450121, at \*45–74 (W.D. Tex. Apr. 20, 2017), where the court conducted the same inquiry and found that plaintiffs failed to prove certain districts at variance from one person, one vote were the result of partisan purpose or other illegitimate reapportionment factors.

380. *Id.*

381. *Whitford v. Gill*, 218 F. Supp. 3d 837, 912 (W.D. Wis. 2016), *prob. juris. postponed to hearing on the merits*, 137 S. Ct. 2268 (2017).

382. *Id.* at 891–96, 922–27.

383. *Id.* at 891–96.

384. See generally Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 *YALE L.J.* 2505 (1997).

political group,”<sup>385</sup> and subsequently in *Whitford*, the district court likewise required partisan intent or purpose and concluded from direct evidence adduced at trial that the partisan bias of the gerrymander resulted from the legislature’s partisan purpose.<sup>386</sup> Along the same lines, every justice’s proposed approach in *Vieth* similarly required proof of partisan intent for unconstitutionality. The major modification proposed here is not that courts newly engage legislative purpose, but instead that when they do already, a finding of partisan purpose can be sufficient for unconstitutionality, in the absence of other legitimate government interests, without the additional showing of excessiveness as to partisan effects.

Second, judicial inquiry into legislative purpose is different from inquiry into legislative motivation.<sup>387</sup> Redistricting is rife with individual legislators with partisan motivations. It is certainly difficult to weigh the importance of individual partisan motivations against the welter of other competing considerations fighting for influence in the complex process. Legislative purpose may be informed by evidence of partisan motivation, but a finding of purpose in this context is more generally aimed at the imputation of an objective legislative aim necessary to make intelligible the legislative adoption of a particular redistricting.<sup>388</sup> Inquiry into partisan purpose here thus does not require a free-ranging hunt for partisan intent anywhere in the process for every case, but instead arises in this context mainly in two situations: (i) when the government cannot explain an alternative, legitimate basis for resulting partisan discrimination, but partisan purpose offers the strongest account; and (ii) when the government declines even to try an alternative explanation and admits its partisan purpose. The latter case of government admission, in particular, occurs more regularly than one might intuit, often as an absurd but popular defense in racial gerrymandering cases that I discuss in greater detail the next Section.<sup>389</sup> Governments confess partisan purpose when they believe that it will be too difficult to establish excessive partisan effect under *Vieth* and therefore explain gerrymandering of racial minority voters in partisan terms to deflect allegations of racially discriminatory intent.<sup>390</sup>

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385. *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion).

386. *Whitford*, 218 F. Supp. 3d at 884–98; see also Ringhand, *supra* note 186 (surveying judicial inquiry into partisan purpose across various areas of First Amendment law).

387. Justin Levitt would go further and invalidate redistricting based on invidious partisan intent. Levitt, *supra* note 14 (manuscript at 16–17). Richard Briffault similarly proposes unconstitutionality when the redistricting is “tainted by excessive pursuit of legislative personal or partisan self-interest.” Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 397, 418 (2005).

388. See Fallon, *supra* note 13, at 543 (describing legislative purpose or intent, in contrast to subjective legislative motivation, as “predicated on what an imagined typical legislature, enacting particular statutory language in a specified historical context, would most reasonably be understood as having aimed at or having been motivated by”).

389. See *infra* notes 424–435 and accompanying text.

390. See *infra* notes 317–327 and accompanying text.

As a consequence, a prohibition on partisan purpose as constitutional justification not only eliminates this perverse defense but actually *simplifies* judicial inquiry into legislative purpose in many redistricting cases. The greatest conundrum in the *Shaw* cases was parsing apart racial and partisan legislative motivations because racial and partisan classifications are so highly correlated and bound up in American politics.<sup>391</sup> This judicial conundrum disappears when neither racial nor partisan purpose suffices as constitutional justification, and courts thus no longer need to distinguish between them.

B. *Substantive Payoffs Beyond Gerrymandering:  
The Challenge of Hyperpolarization*

Beyond partisan gerrymandering, the notion that partisanship can serve as a basis for lawmaking creates precedential incoherence for courts trying to cabin the new hyperpolarization of contemporary American politics. There are constitutional prohibitions on government partisanship in patronage hiring, election-related advocacy, and regulating the election ballot. There is a second-order prohibition on partisanship even in redistricting under the one person, one vote rule. The oddity is that the Court has been equivocal regarding first-order prohibitions on partisanship in redistricting since *Vieth's* dictum that partisanship is an “ordinary and lawful [government] motive.”<sup>392</sup> This equivocation has befuddled lower-court judges confronted with the increasingly pervasive partisanship of today’s politics.<sup>393</sup> *Vieth* and its progeny, in their ambivalence about partisanship, are the prominent outlier from the broader constitutional norm and therefore impede a coherent judicial approach toward modern hyperpartisanship. A clear prohibition on necessary reliance on partisanship as a basis for redistricting would unify constitutional law in the specific area where partisanship is most prominent and obvious today.

A straightforward judicial expectation of government nonpartisanship as a basis for lawmaking should have a salutary “laundering” effect on lawmaking preferences. Courts acknowledge, as Robert Dixon once put it, that “all districting is ‘gerrymandering’” because legislators always seek to advance their reelection and party interests.<sup>394</sup> Even if legislator preferences in

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391. See Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 70–71 (2014), [https://harvardlawreview.org/wp-content/uploads/pdfs/forvol127\\_hasen.pdf](https://harvardlawreview.org/wp-content/uploads/pdfs/forvol127_hasen.pdf) [<https://perma.cc/X7W8-DQLV>].

392. *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality opinion).

393. See, e.g., *Harris v. McCrory*, 159 F. Supp. 3d 600, 629 (M.D.N.C. 2016) (Cogburn, J., concurring) (“While redistricting to protect the party that controls the state legislature is constitutionally permitted and lawful, it is in disharmony with fundamental values upon which this country was founded.”), *aff’d sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017).

394. ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 462 (1968); see, e.g., *Vieth*, 541 U.S. at 289; *In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 643 (Fla. 2012).

redistricting are always influenced by partisanship, however, courts might launder these preferences by refusing to credit them as legitimate justifications in redistricting under rational basis.<sup>395</sup> Whatever the legislators' actual motivations for their redistricting choices, courts can filter out partisan justifications as arbitrary considerations and force legislators to justify their choices only in public-regarding terms courts are willing to credit. In this way, a nonpartisanship norm suppresses explicit partisanship in the redistricting process and channels the government in public-regarding directions where its choices are more legally defensible.

Overt partisanship in the redistricting process should decrease because lawmakers would rightfully worry that overt partisanship raises judicial suspicions and reduces the likelihood their redistricting will be upheld. Such a reduction in "partisan talk" would be healthy in modern redistricting where lawmakers openly threaten to "cannibalize" the minority party<sup>396</sup> and readily agree that redistricting is "the business of rigging elections."<sup>397</sup> Just as importantly, this laundering substantively limits gerrymandering to the extent that the requirement of public-regarding justification limits the achievable magnitude of partisan bias. And, of course, there is always some additional possibility that legislators might actually internalize the nonpartisanship norm to a degree and launder their internal thinking in the face of judicial stigmatization. Rick Pildes has argued, regarding the law of racial gerrymandering, that legislators progressively internalized "a sense of constraint from *Shaw*," thereby minimizing the need for actual litigation and judicial enforcement, and suggests legislators might do the same with an anti-partisanship norm.<sup>398</sup>

The need for judicial assertion of a clear constitutional norm of nonpartisanship is acutely important in today's "hyperpolarized" politics.<sup>399</sup> The Supreme Court's entry into the political thicket in *Baker v. Carr*<sup>400</sup> occurred during a historical era of rare bipartisanship in American politics from the 1950s into the early 1960s. As Henry Brady and Hahrie Han document, the post-World War II era featured nearly unprecedented blurring of partisan lines in Congress and among voters, with unusual levels of ideological overlap across the major parties.<sup>401</sup> For instance, as measured in 1963, the year

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395. See Robert Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75, 75–77 (Jon Elster & Aanund Hylland eds., 1986).

396. *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001).

397. John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1 (quoting state senator Mark McDaniel criticizing the North Carolina legislature).

398. See Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 68–70 (2004); see also Briffault, *supra* note 387, at 419 (agreeing that *Shaw v. Reno* proved "surprisingly manageable" because "the political process absorbed *Shaw*'s prohibition against excessive attention to race").

399. See generally Pildes, *supra* note 22 (explaining hyperpolarization).

400. 369 U.S. 186 (1962).

401. Hahrie Han & Henry W. Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization After the Second World War*, 37 BRIT. J. POL. SCI. 505, 512–16 (2007).

after *Baker v. Carr*, roughly half of House Democrats were more conservative than the most liberal House Republicans.<sup>402</sup> Party loyalties of the time were cross-pressured by race and bipartisan consensus over the Cold War, and the parties were ideologically heterogeneous, each featuring conservative and liberal wings from different regional bases. Even the Court's doctrinal point of entry into the political thicket—one person, one vote—largely pitted intrastate regional interests against each other, urban versus rural, with little national party valence at the time.<sup>403</sup> Instead, the most salient political divisions confronted by courts during the era were racial, not partisan. Liberals in both major parties joined forces to enact the Voting Rights Act of 1965 over conservative Dixiecrat resistance from a one-party Democratic South. The Voting Rights Act forced courts to reckon with questions of racial representation, but these cases generated a minimum of partisan turnover in the one-party South.<sup>404</sup>

However, the gradual ideological realignment of the major parties since *Baker v. Carr*, accelerated by the Voting Rights Act itself, has since hardened into the hyperpolarized rivalry between Republicans and Democrats dominating every aspect of today's national and state politics. Partisan realignment sorted conservatives uniformly into the Republican Party and liberals into the Democratic Party over forty years to produce major parties that are ideologically cohesive and more polarized than at any time since the Civil War.<sup>405</sup> Put simply, for the first time in American history, no Democrat in Congress is as conservative as the most liberal Republican.<sup>406</sup> Because ideological preferences filter down from politicians to voters,<sup>407</sup> the electorate has

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402. David W. Brady, *Party Coalitions in the US Congress: Intra- v. Interparty*, in *THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS* 358, 365 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010).

403. See generally J. DOUGLAS SMITH, *ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT "ONE PERSON, ONE VOTE" TO THE UNITED STATES* (2014). It was no wonder why, then, Chief Justice Earl Warren believed that going forward one person, one vote would ensure that elections "would reflect the collective public interest" and did not anticipate the subsequent rise of partisan gerrymandering, which was then a limited, state-specific problem. See G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 337 (1982); Pamela S. Karlan, *The Alabama Foundations of the Law of Democracy*, 67 ALA. L. REV. 415, 416–17 (2015).

404. See generally Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1713–14 (2004) (outlining this argument).

405. See Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411, 415–16 (2014). See generally MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* (2009).

406. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 45 (2012).

407. See generally CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* (2016); GABRIEL LENZ, *FOLLOW THE LEADER?: HOW VOTERS RESPOND TO POLITICIANS' POLICIES AND PERFORMANCE* (2012).



increasingly polarized into opposed camps of partisans as well.<sup>408</sup> These dynamics of hyperpolarization have removed opportunities for political compromise by differentiating the parties so distinctly from one another.

What is worse, the hyperpolarized parties practice partisan “teamsmanship” where they see their respective fortunes as mutually exclusive and refuse to compromise if it would hand the opposite party any kind of victory.<sup>409</sup> Hostility toward the opposite party now goes beyond ideological disagreement and carries a personal dimension. For example, half of Republicans and a third of Democrats report that they would be displeased if their child married outside their party, and in an experimental setting, 80 percent of Republicans and Democrats preferred to reward a scholarship to a candidate from their own party.<sup>410</sup> In fact, most partisans prefer to reward their fellow party members over out-party candidates even when an out-party candidate has stronger objective credentials.<sup>411</sup> Hyperpolarization is so severe that efforts at bipartisan cooperation are, in Heather Gerken’s words, like “playing cards in a hurricane.”<sup>412</sup>

Under these prevailing conditions, it is no surprise that courts today constantly run up against bolder and new instantiations of government partisanship beyond what courts faced in the 1960s. Today, partisan rivalry between Republicans and Democrats is the singular axis around which all American politics revolve.<sup>413</sup> Even when courts address cases dressed up in terms of racial representation or voter fraud, they wrestle essentially with exercises in hyperpolarization that have spilled from the legislature into the courtroom.<sup>414</sup> Yet in court, these cases are still argued in legal terms under doctrinal frameworks that fail to account for the partisanship that motivates legislative majorities to regularly exploit their lawmaking authority for party advantage. The applicable doctrine in these cases from the Voting Rights Act, one person, one vote, and election administration, among other things, no longer tracks the actual motivations of the government, which today are overwhelmingly partisan.<sup>415</sup> As Sam Issacharoff explains it, “[C]ourts are

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408. See generally ALAN ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2010); LEVENDUSKY, *supra* note 405.

409. FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE* 47–73 (2009); see also FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* (2016); MANN & ORNSTEIN, *supra* note 406; Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 *ELECTORAL STUD.* 12, 21–22 (2016).

410. See Cass R. Sunstein, *Partisanship*, 2015 *U. CHI. LEGAL F.* 1, 5–6.

411. See *id.*

412. Heather K. Gerken, *Playing Cards in a Hurricane: Party Reform in an Age of Polarization*, 54 *HOUS. L. REV.* 911 (2017).

413. See generally Pildes, *supra* note 22.

414. See, e.g., Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 *IOWA L. REV.* 131 (2005) (arguing that election law cases often are political disputes where the losers switch from a legislative forum to the judicial).

415. See, e.g., Issacharoff, *supra* note 313, at 1406 (arguing, for example, that “the category of race increasingly fails to capture the primary motivation for what has become a battlefield in partisan wars”).

searching for the consequences of partisan excess without being able to ferret out the root cause.”<sup>416</sup>

The absence of a unified constitutional norm against government partisanship leaves courts doctrinally short-handed to redress hyperpolarization. Just as the Republican Party systematized a comprehensive national effort called REDMAP to maximize returns from partisan gerrymandering,<sup>417</sup> it also has coordinated a national effort to press election administration for partisan gains. The ensuing “Voting Wars” between the parties on election administration gave rise to widespread state enactment of voter ID laws, early voting cutbacks, and other restrictions targeting Democratic turnout, while leaving alone or expanding absentee balloting and other voting access that advantage Republicans.<sup>418</sup> As I describe above, courts have begun to recognize government partisanship at work and elevated judicial scrutiny beyond rational basis to respond to the threat.<sup>419</sup> Nonetheless, these judicial efforts suffer from the “odd quality” of rejecting government partisanship while hesitating to articulate those efforts forthrightly as rejection of partisan overreach.<sup>420</sup> Ned Foley advocates that courts justify these efforts in terms of fair play under what he proposes as a right to legislative due process.<sup>421</sup> Sam Issacharoff suggests that courts in these cases follow the model of antitrust law in developing an emerging new rule of reason for voter welfare.<sup>422</sup> These are thoughtful efforts, I think, to recast constitutional law in sensible new directions to better address hyperpartisanship. My point is that courts already have developed the right approach to partisanship, albeit in scattershot form at times explicitly and at times implicitly, that needs foremost to be surfaced and acknowledged as a unifying principle across constitutional law. Courts have been surprisingly consistent in applying this principle in disparate areas of law, except for the glaring and therefore quite misleading case of partisan gerrymandering since *Vieth*. Surfacing the principle is valuable not only for reforming partisan gerrymandering, but also critical for rationalizing a cohesive judicial response to hyperpolarization in its novel manifestations.

Explicit recognition of a norm against government partisanship, for instance, would instantly add conceptual clarity to the law of racial gerrymandering. Another odd artifact of courts’ hesitance to explicitly acknowledge the norm is that state governments are now perversely incentivized to admit

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416. Issacharoff, *supra* note 17, at 324; *see also* Charles, *supra* note 309, at 1210–12 (contending that the Court uses racial gerrymandering law to indirectly regulate the excesses of partisan gerrymandering).

417. *See generally* DALEY, *supra* note 23.

418. *See generally* Hasen, *supra* note 295.

419. *See supra* Part II.

420. Issacharoff, *supra* note 17, at 321 (describing the “odd quality to a judicial inquiry that looks to the effects of partisan desires to curtail voter access to the electoral process but leaves an unspoken void around the operational motivation”).

421. Foley, *supra* note 335.

422. Issacharoff, *supra* note 17, at 301–05.

their partisan intent as a defense in racial gerrymandering claims. This incentive arose from the Supreme Court's earlier attempts to exit the morass of racial gerrymandering claims that swamped it during the 1990s after it invented a new equal protection challenge to majority-minority districting in *Shaw v. Reno*.<sup>423</sup> *Shaw* challenges, brought in the 1990s by Republican interests against Democratic-majority governments, needed to prove that race was the "predominant factor" motivating particular redistricting decisions such that it subordinated traditional districting criteria, typically in the literal form of a misshapen majority-minority district.<sup>424</sup> Governments defending against *Shaw* challenges were therefore incentivized to claim that their redistricting decisions were motivated instead by political considerations, often specifically partisan ones, to deflect allegations that race predominated the process.<sup>425</sup> In this sense, the Court eventually channeled the racial gerrymandering claims that preoccupied courts during the 1990s back toward partisan gerrymandering claims during the 2000s, including *Larios*, *Vieth*, and *LULAC* as prominent examples. And then Justice Scalia's declaration in *Vieth* that partisanship is an "ordinary and lawful motive"<sup>426</sup> for redistricting appeared effectively to carve out a safe harbor for gerrymandering provided the state admitted partisan, rather than racial motivations.

The Court confronted this odd result in a new generation of racial gerrymandering cases last Term. In *Harris v. McCrory*, the district court struck down North Carolina's congressional redistricting under *Shaw* after finding race predominated in the construction of the state's majority-minority districts.<sup>427</sup> The state, however, claimed that it referred to race only for the compelling interest of complying with the Voting Rights Act,<sup>428</sup> and beyond that purpose, sorted voters by race not for race's sake, but as a tool for partisan gerrymandering.<sup>429</sup> During the Supreme Court oral argument for *Harris*, Justice Kagan jumped straight to this state defense and summarized,

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423. 509 U.S. 630 (1993).

424. *Miller v. Johnson*, 515 U.S. 900, 917 (1995).

425. See, e.g., Hasen, *supra* note 391, at 71 ("[I]f 'partisan' factors predominate in the legislature then those challenging the proposed district lines lose, but if 'racial' factors predominate they win."); Issacharoff, *supra* note 124, at 637 ("The upshot . . . is that so long as the white majority Democratic legislature was gerrymandering a congressional district to reward its own interests, the Constitution would remain silent."). Sometimes the government switches between racial and partisan explanations for its lawmaking depending on the lawsuit. See, e.g., *Bush v. Vera*, 517 U.S. 952, 970 (1996) (plurality opinion) (chiding the state for defending itself in racial terms against partisan gerrymandering claims and then explaining itself in partisan terms against racial gerrymandering claims).

426. *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality opinion).

427. 159 F. Supp. 3d 600, 610–11 (M.D.N.C. 2016), *aff'd sub nom.* *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

428. *Harris*, 159 F. Supp. 3d at 614.

429. Similar defenses of party, not race, were raised in defense of voter ID laws against Voting Rights Act challenges. See, e.g., *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 226 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017); *Veasey v. Abbott*, 830 F.3d 216, 253 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 62 (2017); *One Wis. Inst., Inc. v. Thomsen*,

“Is it politics or is it race? If it’s politics, it’s fine; if it’s race, it’s not.”<sup>430</sup> Of course, the state’s claim it considered racial data for partisan purposes has greatest credibility in the South, where racial polarization between white Republicans and African American Democrats is so intense. When African Americans vote reliably for Democrats 95 percent of the time, race is a more reliable proxy for partisanship than party registration.<sup>431</sup> In a real sense, all redistricting here is partisan as the hyperpolarized party in control considers every redistricting tool in its means to maximize party advantage. The intense partisanship of today’s politics ironically might have meant the state always has a credible defense to racial gerrymandering. The Court’s reluctance to announce a clear, unifying rule against government partisanship, most obviously in *Vieth*, made it difficult to deny this state defense of racial gerrymandering in cases like *Harris*.

The oddity of the state defense of party, not race in *Shaw* cases is fundamentally absurd. It is no better if the government disadvantages minority voters because they are Democrats than if it does so because they are African American. To the degree these scenarios are even distinguishable conceptually,<sup>432</sup> African American voters lose electoral opportunities either way from deliberate government efforts to prejudice election outcomes against a defined subgroup of voters the government disfavors. Under either interpretation of *Harris*, the North Carolina legislature has narrowly targeted African American voters for what should be, and often are judicially regarded as, illegitimate and arbitrary justifications.<sup>433</sup> Outside of redistricting, further away from *Vieth*’s influence, federal courts already are deciding that discriminating against African American voters in election administration violates the Voting Rights Act even when done for partisan purposes.<sup>434</sup> Still, within the context of redistricting, the Court had left the door open for partisan

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198 F. Supp. 3d 896, 934 (W.D. Wis. 2016), *appeal docketed*, No. 16-3083 (7th Cir. Aug. 2, 2016); *Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 583 (E.D. Va. 2015).

430. Anna Douglas, *Supreme Court on NC Gerrymandering: ‘Is It Politics or Is It Race?’*, CHARLOTTE NEWS & OBSERVER (Dec. 5, 2016, 6:48 PM), <http://www.newsobserver.com/news/politics-government/article119055958.html> [https://perma.cc/5CUV-EPAP] (quoting Justice Kagan).

431. See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 245 (2001) (noting “white voters registered as Democrats ‘cross-over’ to vote for a Republican candidate more often than do African-Americans, who register and vote Democratic between 95% and 97% of the time”).

432. See, e.g., D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 590–97 (2008) (questioning whether racial motivations can be causally separated from other political factors).

433. See, e.g., *N.C. State Conference of the NAACP*, 831 F.3d at 214 (striking down as unconstitutional a series of election administration enactments as discriminatory against African Americans “with almost surgical precision” and which “constitute inapt remedies for problems assertedly justifying them [or] that did not exist”).

434. See *id.* at 223; *Veasey*, 830 F.3d at 272; *One Wis. Inst.*, 198 F. Supp. 3d at 904–05.

manipulation in *Vieth*, and thereby permitted leakage for other types of re-districting manipulation to be justified as partisan as well.<sup>435</sup> The Court now has the timely opportunity to unify constitutional law under a coherent prohibition against partisan manipulation across the board.

#### CONCLUSION

Before leaving the White House, President Obama had already targeted redistricting as a personal postpresidency priority. He began organizing a group, headed by former Attorney General Eric Holder, to mobilize in advance of the 2021 redistricting cycle.<sup>436</sup> It was a perfectly rational response by America's leading Democrat to two important, related developments. One is the undeniable fact of hyperpolarization between the major parties that dominates every aspect of American politics from the national to the local level.<sup>437</sup> The other is masterful organization by Republicans, beating Democrats to the punch, in pouring resources and attention into gerrymandering as a critical lever in the hyperpolarized partisan fight. Courts are beginning to respond to the challenges of this hyperpolarized arms race, but judicial failure thus far to curb partisan gerrymandering is the most glaring exception to the overarching norm against government partisanship. Courts have wasted more than a decade since *Vieth* in search of elusive standards to measure excessive partisan effect, when a better approach, focused on the central role of government partisan purpose, is readily available and more faithful to larger values of constitutional law. The importance of a judicial check cannot be overstated when hyperpolarization is so strong that partisans increasingly parrot the party line<sup>438</sup> and change their tune accordingly when the party line abruptly reverses course.<sup>439</sup> These are cynical times. The usual

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435. In *Cooper v. Harris* last Term, the Court tried to limit this leakage by noting that "sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics." 137 S. Ct. 1455, 1473 n.7 (2017).

436. See Alexander Burns & Jonathan Martin, *Eric Holder to Lead Democrats' Attack on Republican Gerrymandering*, N.Y. TIMES (Jan. 11, 2017), [https://www.nytimes.com/2017/01/11/us/eric-holder-to-lead-democrats-attack-on-republican-gerrymandering.html?\\_r=0](https://www.nytimes.com/2017/01/11/us/eric-holder-to-lead-democrats-attack-on-republican-gerrymandering.html?_r=0) (on file with the *Michigan Law Review*); Edward-Isaac Dove, *Obama, Holder to Lead Post-Trump Redistricting Campaign*, POLITICO (Oct. 17, 2016) <http://www.politico.com/story/2016/10/obama-holder-redistricting-gerrymandering-229868> [<https://perma.cc/TKP6-LDVL>].

437. Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 75–82 (2017).

438. See, e.g., James N. Druckman et al., *How Elite Partisan Polarization Affects Public Opinion Formation*, 107 AM. POL. SCI. REV. 57 (2013); see also Ariel Malka & Yphtach Lelkes, *In a New Poll, Half of Republicans Say They Would Support Postponing the 2020 Election if Trump Proposed It*, WASH. POST (Aug. 10, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/10/in-a-new-poll-half-of-republicans-say-they-would-support-postponing-the-2020-election-if-trump-proposed-it/> [<https://perma.cc/56US-GG63>] (reporting that roughly half of Republicans say they would support postponing the 2020 election if Republican leadership proposed a delay to ensure only eligible American citizens can vote).

439. See, e.g., Dina Smeltz, *Republicans Used to Fear Russians. Here's What They Think Now*, WASH. POST (Feb. 16, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/>

political remedies from a less partisan era no longer apply as they once might have. When partisanship is its own justification, both as a political and constitutional matter, it is hard to imagine the major parties walking back from further partisan escalation without judicial intervention.

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2017/02/16/republicans-used-to-fear-russians-heres-what-they-think-now/ [https://perma.cc/3XF7-SBEF] (describing a rapid reversal of Republican attitudes about Russia to mirror newly elected President Donald Trump's views).